

# *Windows of Opportunity for Mediation in Swansea-Elyria, Colorado*

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## PART I.

### “Like a Big Balloon in the Sky”

One of the things we have managed to do in our little career here in the middle of this mess is to set precedent. For example, the jury award in the ASARCO/Globe plant suit was the largest jury award ever made to a community at that time. In this case, our attorney tells us that we’re the first community group that ever got standing in the federal court to sue. And so it sends this message: Look, you can’t take advantage of community people, they’re not stupid, they’re not resourceless. You can’t just walk on folks because they’re people of color, because they’re poor. You can’t do that. And that to us is the great joy – Lorraine Granado, President of the Cross Community Coalition

*Background.* To the north of I-70 near the border of Denver and Adams Counties in Colorado lies a series of neighborhoods increasingly brought together to discuss why the environment in which they live may be causing them harm. The communities of Globeville, Elyria, Swansea, Cole, and Clayton currently constitute the “Vasquez Boulevard/I-70 Site,” 450 acres in northeast Denver proposed to the National Priorities List (NPL) on January 19, 1999.<sup>1</sup> Within this area, roughly 17,500 people reside in about 5,126 housing units according to the 2000 census. At least 69% of the people in the study area are of Hispanic origin, 21% are African-American, and 3% are American Indian, Alaskan Native, Asian, or Hawaiian.<sup>2</sup> Inside and immediately surrounding the proposed Superfund site are roughly 150 industrial land uses including four NPL sites, three lead smelters, two oil refineries, and numerous RCRA (hazardous waste) sites.<sup>3</sup> Much of the area is contaminated with soil concentrations of lead, arsenic, and zinc well

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<sup>1</sup> Environmental Protection Agency. Draft report for the Vasquez Boulevard and I-70 site, Denver, CO, residential risk-based sampling, stage I investigation. Denver: US Environmental Protection Agency, 1999 April. Under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9601 et seq. (1980) and its major amendment and reauthorization, the Superfund Amendments and Reauthorization Act (SARA), Congress established the authority to clean up contamination from past waste disposal practices that now endanger public health. An administrative system was set up to identify sites in need of remediation, including the establishment of a National Priorities List, that functions to ensure that the most dangerous sites are cleaned up first. The NPL has a complex series of criteria that have to be met before a site is placed on the national listing, which empowers the EPA to undertake cleanups, seek reimbursement from responsible parties, issue administrative orders, and seek court orders directing responsible parties to act.

<sup>2</sup> Agency for Toxic Substances and Disease Registry. Public Health Assessment for Vasquez Boulevard and I-70, Denver, Denver County, Colorado, EPA Facility ID CO0002259588. Atlanta: ATSDR Division of Health Assessment and Consultation, 2002 April.

<sup>3</sup> A community organization, the Cross Community Coalition, received a grant in 1998 from the EPA’s Regional Geographic Initiative to study local pollution problems. The CCC identified a variety of emission sources within their zip code (80216), including mobile sources, bakeries, manufacturing facilities, printers, metal shops, vehical repair shops, refineries, and a major electric power plant which burns low-sulfur coal. These businesses together emit more than 18,000 tons of sulfur dioxide, 16,000 tons of nitrogen dioxide, and 875 tons of volatile organic compounds per year and utilize nearly 5,000 diesel trucks.

above what is considered safe by the federal government.<sup>4</sup> Interstate 70, which split Swansea and Elyria in half when it was constructed in the mid-1960's, rises high above these communities on viaducts. The state Transportation Department has considered expanding the highway to as many as ten lanes.<sup>5</sup>

Insert Map of Area and Land Uses Here

At times literally within the shadow of I-70, the residents of Swansea-Elyria persevere. These traditionally working-class neighborhoods retain high rates of homeownership, are highly organized, and remain proud of the neighborhoods that they strive to maintain.<sup>6</sup> Yet, the stories of those who live here can easily become lost amid the troubling statistics found in boxes of agency assessments and court documents. This is the story of how one group of organizers, the Cross-Community Coalition, sought to turn what could have been portrayed and accepted as a routine accident by an area industry into an opportunity for that industry to recognize and appreciate the concerns of neighboring residents, and their participatory vision for improving their quality of life. The case of the Cross-Community Coalition's (CCC) struggle to hold Vulcan Materials Company accountable for an accidental air emission also presents an opportunity to examine the role of mediators in assisting environmental justice groups whose interests cannot entirely be met through traditional means.

The first thing to understand about Swansea-Elyria, sister communities at the heart of the most recently proposed Superfund site, is the complexity and origins of the environmental burdens faced by those who live there. Prior to development of the I-70, a variety of ethnic groups (Eastern Europeans, Irish, Italians, and Hispanics) came to work in nearby packinghouses and other businesses. The concentration of industry grew rapidly after the construction of I-70, which follows a common trend in highway planning to route large-scale infrastructure through low-income, inner city areas in order to serve new and anticipated residential and commercial developments (as well as transportation hubs such as the Denver airport).<sup>7</sup> In addition to zoning dynamics which clustered

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<sup>4</sup> *Supra* note 2, Appendix B. Phase III of ATSDR's testing (which encompassed 2,986 properties) revealed that arsenic was present at all properties, with 268 properties showing average arsenic levels greater than 128 parts per million. The highest average arsenic level was 759 ppm in soil based on averaging three composite samples from the property. Similarly, 276 properties have average soil-lead concentrations above 400 ppm, with the highest average lead level being 1,131 ppm. ATSDR levels greater than 270 ppm to be a concern for children who exhibit hand-to-mouth behavior.

<sup>5</sup> Morson, B. (1995). In the shadow of I-70. *Rocky Mountain News*, 19 Nov. 1995, p. 36A.

<sup>6</sup> Several community environmental organizations operate within the area. Neighbors for a Toxic Free Community, an association of residents of Swansea, Elyria, and Globeville, has worked since 1987 to educate themselves of remediation efforts surrounding contamination from the ASARCO smelter. This group now operates under the auspices of the Cross Community Coalition (CCC), a non-profit serving the three neighborhoods. The mission of the Coalition is to improve the quality of life of residents. CCC operates a Family Resource Center which offers adult education classes, youth employment, job placement, parenting classes, nonviolence and environmental education, and other social services. CEASE, which includes residents of Clayton, Elyria, Swansea, and Southwest Globeville, represent the broader health concerns throughout the VB/I-70 Superfund process, by demanding appropriate soil clean-up levels, hiring a national expert in arsenic and lead toxicity, organizing educational forums, and working with the ATSDR.

<sup>7</sup> Bullard, R. & Johnson, G. (Eds.) (1997). *Just Transportation: Dismantling Race and Class Barriers to Mobility*. Stony Creek, CT: New Society Publishers.

industry in northeast Denver<sup>8</sup> and the politically-charged process of routing highways, a third dynamic has contributed to the environmental stigma that continues to attach itself to the area. Decades prior, the Central Platt Valley, located closer to downtown Denver, had been the site of the region's shipping yards.<sup>9</sup> These shipping yards began to succumb to the interests of developers who replaced them with more lucrative land uses such as condominiums. Switching and holding operations were moved to outlying areas, including the corner of 52<sup>nd</sup> Avenue and Thompson Court, eight feet from a barbed wire fence that was used to separate tankers and square cargo holders from a nearby playground and the Swansea Community Center.<sup>10</sup> Often, the terminal would be used to store hazardous chemicals in tanker cars that were owned by one company, leased by another, and housed by yet a third.<sup>11</sup> Ownership and responsibilities for the terminals and tanker cars can be difficult to understand, even on paper. The 52<sup>nd</sup> Ave. terminal would become the focal point for one of many disputes to unfold as residents addressed the heavy environmental burdens that they were asked to bear.



Figure 1. Tanker Cars Near Site of HCL Release

Starting in May, 1982, Vulcan Chemicals,<sup>12</sup> a division of Vulcan Materials Company, maintained a railcar service contract with General American Transportation Corporation (GATX). The contract permitted Vulcan to move 25 cars to points of its choosing and to use them to transport goods for a maximum of 18,000 miles during a given year.<sup>13</sup> According to

<sup>8</sup> Residents contend that the City of Denver decided to turn the communities of Swansea and Elyria into an “industrial park” in 1958. Interview of Resident of Swansea, March 8, 2002 in Swansea.

<sup>9</sup> Interview with Swansea resident, March 8, 2002 in Swansea.

<sup>10</sup> Site visit on March 6, 2002 by the author was used to generate this description.

<sup>11</sup> Vulcan Materials Company, owner of a terminal in Swansea, was the lessee and operator of a rail tank car that leaked hydrochloric acid in March, 1995, resulting in an evacuation of four square blocks. General American Transportation Corporation (GATX), based in Chicago, leases rolling stock, including car #14637, the cause of the incident. GATX Capital Corporation, based in Delaware, owns rolling stock, including the car in question. Neighbors for a Toxic Free Community et al. v. Vulcan Materials Company and General American Transportation Corporation, Memorandum Opinion and Order. Civil Action No. 95-D-2617 (D.Co. 1997).

<sup>12</sup> Vulcan Chemicals had sales of \$642 million in 2001, and operated 29 chemical distribution terminals including 10 that stored HCL within the United States. Vulcan Chemicals produces and transports chlorine, caustic soda, hydrochloric acid, potassium chemicals, and chlorinated organic chemicals. [www.vulcanmaterials.com/vc.asp](http://www.vulcanmaterials.com/vc.asp) (accessed July 25, 2002)

<sup>13</sup> General American Transportation Corporation, Car Service Contract Number 2856, 20 May 1982 and Revised Rider No. 44, November 24, 1993. The Revised Rider specifically mentions 25 cars, including car 14637, the car that resulted an accidental hydrochloric acid leak. The rubber lining of the tank car that would eventually break down is stated as the property of GATX, although the Customer, in this case

Vulcan's records, in 1994 the company maintained a level inventory of approximately 36,100 gallons of Hydrochloric Acid (HCL) at the terminal at 52<sup>nd</sup> Ave. in Denver.<sup>14</sup> The chemical, stored and distributed for use in stimulating the flow of oil in various industrial processes, is listed as a corrosive, hazardous material with potentially acute health effects if released.<sup>15</sup> At the same time, the facility maintained no release detection systems at its terminal, and emergency response equipment was limited to "absorbent tubes kept on site to contain small spills."<sup>16</sup> While site plans of the property and accompanying descriptions clearly indicate "residential housing" directly across the street from the terminal as well as "residential neighborhoods south of 52<sup>nd</sup> Avenue" and "east and south of the site,"<sup>17</sup> the company operated as if it were isolated from nearby residents.<sup>18</sup>

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Vulcan, is held responsible for paying the cost of the interior lining and maintaining and renewing the lining whenever necessary.

<sup>14</sup> Vulcan Chemicals SARA Title III, Tier II Report, Colorado Emergency Planning Form, Reporting Period Jan. 1-Dec. 31, 1994.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, under "Additional Emergency Planning Information."

<sup>17</sup> *Ibid.*

<sup>18</sup> The Vulcan employees who would later become involved in negotiations with the CCC had extensive experience with Community Advisory Panels, or groups of plant managers, environmental professionals, and residents who share information about plant operations and discuss issues of concern to the community. Vulcan had created one of these panels, the Community Involvement Group, in 1988 in response to concerns over health impacts and protests over the production of chlorofluorocarbon precursors at its Wichita, Kansas facility. Cohen, N., Chess, C., & Lynn, F. (1995). *Fostering environmental progress: A case study of Vulcan Chemical's Community Involvement Group*. Center for Environmental Communication, Rutgers University and Department of Environmental Sciences and Engineering, University of North Carolina at Chapel Hill. A corporate official explains their lack of similar response in Swansea-Elyria:

I think the main reason is that we are a lean organization that had really focused our resources up unto that time on our main operating location. So, we have three really significant chlor-alkali manufacturing plants in different parts of the country that had hundreds of millions of dollars of capital sunk into them and a lot of people, and that was the place where we had focused. So we weren't really focused on these small terminal-type operations around the country [Vulcan estimates that they had between 20 and 30 terminals at the time], and it would be really difficult for us to, even today, to develop an advisory panel for each of those and just to get it going; it's a very time-intensive process. Interview with Vulcan corporate official, May 21, 2002 via telephone.

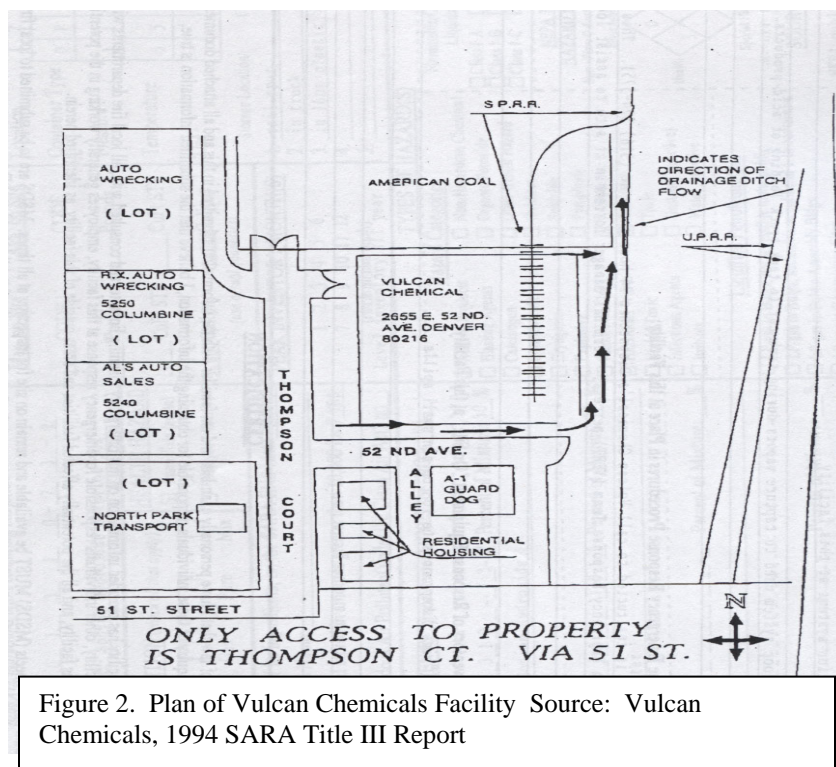


Figure 2. Plan of Vulcan Chemicals Facility Source: Vulcan Chemicals, 1994 SARA Title III Report

*The Incident.* On March 29, 1995, several of the 207,500 railroad tank cars operating in the United States were housed at the Vulcan Chemical Company terminal in Swansea.<sup>19</sup> At approximately 2:40 p.m., the sole employee stationed at the terminal discovered that muriatic acid (35% of which was hydrochloric acid) had eaten a hole in the bottom of one of the tank cars parked at the terminal.<sup>20</sup> As what would amount to 3,300 gallons of the material began to form a vapor cloud which wafted toward neighboring homes, the employee notified the local fire department.<sup>21</sup> The National Response Center was not notified until later that evening.<sup>22</sup> Meanwhile, residents were slowly becoming aware of the significance of the incident:

So I'm sitting at home at my computer working on a grant and my son, my middle son who would have been about 23, he called me on the phone and said "Mom you can't believe what's going on here." He said "I'm over here at Padilla's house and right across the street they've got the HAZMAT unit, these people have all of their suits on, I don't know what's going on but it must be bad." And my response is "Paul, get out of there. Come home, get out of there." And he said "I don't know what it is," and I said "Well if you can ask somebody, but get out of there!" And so then he said "Turn the TV on, turn the TV on." And this is like 3:50 and they're on there so I turn it on and they start talking about there's been this spill but at this point they think it's hazardous material and they're not really sure if it is but there was a spill and a HAZMAT unit has been sent to this location. I'm watching this TV and then we hear that it's probably hazardous materials and

<sup>19</sup> Brief in Support of Motion for Summary Judgment by General American Transportation Corporation and GATX Capital. *Neighbors for a Toxic Free Community et al. v. Vulcan Materials Company et al.*, CA 95-D-2617 (N.Co. 1996).

<sup>20</sup> Vulcan Chemicals, CERCLA Section 104 Information Request, sent to Prevention Section, Emergency Response Branch, US EPA, May 1, 1995.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

so then I race over to, my mom and dad live just behind me on the next block so I raced over there and there's my mom and my dad, my brother and his wife, and their four children and so my dumb brother and my dumb dad go over there and then they come back and say well, they said it's something called HCL and I said "Oh, dear God, HCL!" And I said "Get out of here, get the babies, get in the car, get out of here! David, take mom and dad and get out of here." And my dad's going "Well no, I don't want to." "Get out of here, just go, just go, just go!" And then my neighbor, Jeffrey, who I grew up with, came out and he said "What's going on?" And I told him, I said "Jeffrey, you have to get some of these old women out of here, man. I mean you've got people like Nelson and she don't drive, Ms. Radovich and she don't drive," you know you start naming the widows on the block, they don't drive, we've gotta start getting these people out of here. So we started kind of doing some evacuation and then about this time, my younger son who at that point would have been about 8, Mario came home and so I knew it was time for me to get out of there, too, I needed to get him out of there. Meantime, while I'm waiting, we kind of got the old ladies just on that block and started telling people to tell people, tell everyone you know, and then I went home and I started calling the Fire Department. Well, the freakin' fire department didn't even have a number where you could call them directly, and so I called downtown and they didn't know about it and they're telling me to call the local Fire Department...

Well these doggone policemen sat there in their cars on the [evacuation] boundary not letting people in. And we're going up to them telling them look, you guys: You gotta get on the bullhorns and drive up and down these streets and tell people to evacuate. They refused to move, you know, "we're not going in there." They refused to move and so you've got all these folks who don't even know that this is going on, and these policemen would not move from those stations, they wouldn't move. And it made us very angry; how are people gonna know? After that, it had to be already 5 o'clock by then, then Nadia and I went over to the neighborhood health clinic which is in Globeville, because my friend Gerry was a nurse administrator there, she's a nurse practitioner and she'd worked at ASARCO and we got to be really good friends. So we went over and said Gerry, do you know what's going on? She said "no." I said "Turn on the tube." And so she turned on the tube and she said "Why don't we know about this? Nobody said a word to us about this." So we called the recreation centers, they were closed. We called the schools, they were closed. And then we started calling our city councilperson, whatever. Eventually we found out that they had set up a site at the National Winston Stockshow for people who were evacuated because they needed to evacuate people but they didn't have any place to go. Went over there and there were just a few people. And we said well, where are the rest of the people? And we found out later that the doggone fire department never got there until 5:30, this is like two and a half hours after the spill, and they were going door to door to evacuate. None of the doggone firemen knew how to speak Spanish in a community where 47% speak Spanish. They were going to people's doors saying "Vamoos." Now what the hell does that mean? Vamoos. You know? One lady, my friend who lived three blocks away from the site did not get a knock on her door until 8:30 that evening, and I'll tell you that I believe that it's the grace of God that no one got killed and I'll say this everywhere. You could stand here, I came here and actually we went to my son's house and we came back, but you could stand here and you could see this cloud of acid, like a big balloon in the sky, just hanging up there just as still as it could be.<sup>23</sup>

Unbeknownst to members of the community, a series of steps were being taken to decide the extent of the risks posed by this cloud of HCL, the appropriate containment and decontamination approaches to initiate, and potentially the fate of local residents. As agencies worked toward a solution to the growing threat, residents tried to make sense of a rapidly unfolding chain of events, reconstructed here from company and agency documents:

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<sup>23</sup> Interview of Swansea resident, March 5, 2002 in Swansea.

Table 1. Vulcan Materials HCL Release Incident Timeline.<sup>24</sup>

Date	Time	Description
March 29, 1995	2:40 p.m.	Release occurs from railcar GATX 14637 (capacity: 20,000 gallons); car was leaking from a bottom sump area at the rate of 10-15 gallons per minute
	2:40 p.m.	Release is discovered by the sole Vulcan employee on-site
	3:00 p.m.	Denver Fire Department Notified
	3:02 p.m.	Alarm sounds at Denver Fire Department
	3:05-5:00	HM-1 (hazardous materials team) responds and immediately requests notification of EPA and wastewater and cleanup company; Set up upwind and interrogated Vulcan employee as to tools, materials, and connections needed to offload remaining contents into an empty HCL car next to leaking car
	5:00 p.m. – 5:45 p.m.	Transfer of HCL from leaking tank car into receiving tank car begins
	6:45 p.m.	Still transferring; soda ash arrives and is applied to spilled acid
	7:10 p.m.	National Response Center notified
	8:03 p.m.	Denver Office of Emergency Preparedness requests meters to monitor the vapor cloud.
March 30	12:30 a.m. – 12:45 a.m.	Remaining contents of GATX 14637 completely transferred to another car
	After offloading	Lewis Maintenance, an emergency response contractor, arrives with pumps to transfer spilled acid from the ground; lacks sufficient hose; 2.5 hours later additional hose is found
	8:45 a.m.	Air staffer at EPA says that they are getting calls from people complaining of burning eyes; Fire Department called for more information
	9:00 a.m.	Fire Department says that there is an air inversion that should lift between 10:00 and 11:00 a.m. Tells EPA that if there are further inquiries, people should be told to rinse their eyes and stay out of low-lying areas near the Platte River
	9:00 a.m.	Completion of transfer of spilled acid, which had been confined to a bermed area near the tank car, to a receiving car by Lewis Maintenance
	9:00 a.m.	Public allowed back in to evacuated area and advised to wash down homes, cars, and vegetation
	10:10 a.m.	Denver Fire Department confirms no remaining cloud
	5:30 p.m.	Vulcan Chemical calls EPA emergency line to report spill
	6:00 p.m.	Public meeting held concerning the spill at the Swansea Recreation Center
	10:00 p.m.	Completion of neutralization of residual soil on the ground through use of lime and soda ash; verification through pH testing by Lewis Maintenance

The ordeal ended late the following evening. Thankfully, the vapor cloud, which could have proven fatal if inhaled in certain concentrations, had shifted to the east and avoided

<sup>24</sup> Timeline constructed from the following materials: Denver Fire Department Field Incident Report, Incident Number 14149, March 29, 1995; Denver Office of Emergency Preparedness, Hydrochloric Acid Leak, March 29, 1995; Department of Transportation, Hazardous Materials Incident Report 95050318, July 6, 1995; Colorado Department of Health, Emergency Management Unit, Incident Report, March 29, 1995; and Vulcan Chemicals CERCLA Section 104 Information Request Form submitted to Prevention Section, Emergency Response Branch, US EPA.

the populated areas of Swansea.<sup>25</sup> A few dozen residents were transported to the Denver Coliseum the previous evening, and 300 residents within a 20-30 block area were eventually evacuated.<sup>26</sup> As the threat began to subside, residents discussed the existence of tanker cars in their community, and recalled past events such as the rupturing of a rail tanker carrying 20,000 gallons of nitric acid in nearby rail yards on Easter Sunday in 1983.<sup>27</sup> As troublesome to residents as the existence of the railroad tracks that sliced through their neighborhoods was, other issues were surfacing: (a) the lack of institutionalized safeguards to both prevent and respond to accidental releases, (b) the failure of companies such as Vulcan to disclose and communicate the risks posed by their handling of hazardous materials to residents, and (c) city-community relations after an incident that left residents feeling mistreated. All would become the focus of meetings held at the nearby Swansea Recreation Center and the Cross Community Coalition to discuss the event.<sup>28</sup> Meeting notes for a public forum held on March 30<sup>th</sup> indicate the following common questions:

- Why were residents still in their homes well after the incident was recognized by the Fire and Police Departments? (Residents indicated that evacuation seemed to start at 5:30 and many residents were still in their homes well after that. Fire Department personnel reportedly walked door-to-door in full self-contained breathing apparatuses without the benefit of loud speakers. They were unable to converse in Spanish. The starting time for the evacuation was contested, with times as early as 4:15 suggested.)
- What is the emergency response plan for the area? (The Fire Department had emergency plans, but no specific plans for individual communities. Residents explained that given the concentration of Superfund sites and other industries, the area needed a specific plan. It was mentioned that this was the third evacuation that had occurred in the neighborhood)
- What level of coordination among city services was achieved during response to the incident?
- Why did various city agencies lack clear information about what was happening during the incident? (Several mentioned a communications disconnect and recommended a single point of access to information)
- Why was dealing with bilingual residents such a challenge to those responding to the incident?
- Why was Vulcan Materials not represented at the meeting and did they understand the legal reporting requirements under EPCRA?

Records indicate that Denver's Office of Emergency Preparedness and the Denver Fire Department did attempt to learn from the incident and address some of the residents' concerns, although the extent to which these responses were coordinated and resulted in improved emergency response capabilities is open to question.<sup>29</sup> What remains clear is

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<sup>25</sup> Cortez, A. (1995). Anger spills over: Residents vent their frustration with evacuation. *Denver Post*, March 31, 1995 at B-2.

<sup>26</sup> Denver Office of Emergency Preparedness, *Supra* note 24.

<sup>27</sup> Kirksey, J. & Cortez, A. (1995). Rail-car Leak Forces Evacuation. *Denver Post*, March 30, 1995 at B-1.

<sup>28</sup> Notes to Meeting with Public Concerning HCL Release. March 30, 1995 (compiled by author).

<sup>29</sup> Letter from Michael Michalek, Staff Assistant, Office of Emergency Preparedness to Debbie Gomez, Department of Health and Hospitals, July 17, 1995 (regarding a plan that provides an overview of agency duties and responsibilities, the future use of multilingual cards developed by the Fire Department, the need for multilingual Public Information Officers, and their attempts to find out about communications systems that would allow multiple calls to one phone number providing incident updates for residents); Denver Fire Department, Critique for Incident #14149, Hydrochloric Acid Leak, April 4, 1995 (states that training sessions should be conducted with mutual aid Departments and the State Patrol for future incidents); Memorandum from Captain Steve Maddock to Ch. 6 Sponsel, Critique of Hydrochloric Acid Spill 3-29-95,

that at least initially, the companies responsible for the incident were unresponsive to residents' concerns.

*The Dispute.* The community's efforts to learn the circumstances surrounding the release of hazardous chemicals would become the focus of litigation against Vulcan and other parties.<sup>30</sup> The primary cause of action for a citizen suit filed on behalf of the Cross Community Coalition and several residents was the Emergency Planning and Community Right to Know Act (EPCRA).<sup>31</sup> EPCRA was enacted following two chemical releases involving Union Carbide plants in 1984 (in Bhopal, India and Institute, West Virginia).<sup>32</sup> In both cases, government officials discovered that the extent of the disaster was heightened by a lack of an adequate emergency planning. Following a study by the EPA commissioned the following year (which identified over 6,900 chemical spill accidents across the country in the previous five years), Congress enacted legislation to improve the public's knowledge of chemicals located in their communities and to create plans at each level of government to respond to future accidents.<sup>33</sup> EPCRA provides two kinds of enforcement mechanisms to encourage implementation of its various planning and notification provisions: administrative proceedings initiated by the EPA, and citizen suits authorized when an owner or operator of a facility fails to complete certain forms or submit data or emergency notices.<sup>34</sup> At the time, citizen suits were increasingly relevant to enforcement of EPCRA as funding cuts for the EPA in the 1980's resulted in a significant drop in administrative enforcement.<sup>35</sup>

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April 4, 1995 (site-specific improvements are listed such as the need to define warm and hot zones better during an incident, need to rethink the use of soda ash and ways to knock some of the vapor cloud down, need to manage number of people in the warm zone/site control, need to set up the decontamination trailer which is described as being in "sad shape," and the need for in-suit communications). Residents agree that the Fire Department, in particular Fire Chief Rich Gonzalez, pledged to overview their practices and make changes, including improved notification of clinics and other vulnerable places during an incident. After the community meetings, the City and Vulcan agreed to have Vulcan purchase and install a reverse 911 calling system for resident notification, which is now in place. Interview with Swansea residents, March 5, 2002 in Swansea.

<sup>30</sup> Specifically, Vulcan Materials was accused of failing to follow both Section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Section 326 of the Emergency Planning and Community Right-to-Know Act (EPCRA), which dictate how an entity with hazardous substance holdings about reportable quantities must submit emergency notices in the event of an accidental spill or release. Plaintiffs' Complaint, Neighbors for a Toxic Free Community et al. v. Vulcan Materials Company et al., CA 95-D-2617 (N.Co. 1995); Administrative Complaint and Notice of Opportunity for Hearing, United States Environmental Protection Agency Region VIII v. Vulcan Materials Company, CERCLA-VIII-95-25.

<sup>31</sup> Section 326, 42 U.S.C. § 11046.

<sup>32</sup> Bumoer, K. (1997). *United Musical Instruments v. Steel Company: The Conflict Over the Safety of our Communities and the Emergency Planning and Community Right-to-Know Act*. *Northwestern University Law Review*, 91: 1599-1641. The Bhopal accident, which occurred on December 3, 1984, killed more than 6,000 people and sent over 100,000 to the hospital. Green, K. (1999). An analysis of the Supreme Court's resolution of the Emergency Planning and Community Right-to-Know Act citizen suit debate. *Boston College Environmental Affairs Law Review*, 26: 387-434.

<sup>33</sup> H.R. Conf. Rep. No. 99-962 (1986).

<sup>34</sup> 42 U.S.C. §§ 11045 and 11046.

<sup>35</sup> Stubbs, C. (2000). Is the environmental citizen suit dead? An examination of the erosion of standards of justiciability for environmental citizen suits. *New York University Review of Law and Social Change*, 26:

Under a provision of EPCRA that to date had not been used as a cause of action,<sup>36</sup> plaintiffs argued that those responsible for the release of a hazardous substance<sup>37</sup> must submit a written follow-up emergency notice to (in the case of Vulcan) the Denver Office of Emergency Preparedness and the Emergency Management Unit at the Colorado Department of Public Health and Environment.<sup>38</sup> Violations and associated penalties for not submitting a follow-up notice were to accrue on a daily basis, and at the time plaintiffs' civil suit was filed, 396 days had passed since the HCL release. The EPA's penalty policy for written notices submitted more than two weeks following a release called for the highest level of penalty (\$25,000 per day) for such untimely notifications, meaning defendants faced potential civil penalties of up to \$9.9 million, not including attorneys' and expert witnesses' costs.

Prior to litigation, plaintiffs (including Neighbors for a Toxic Free Community, the Cross Community Coalition, and several residents) attempted to share their concerns with Vulcan management through a series of letters outlining Vulcan's violations of EPCRA. Initially, they did not receive a response.<sup>39</sup> The letters were followed by a 60 day notice of intent to sue sent to Vulcan and other parties.<sup>40</sup> Importantly, Vulcan's lack of responsiveness and the willingness of the district court to hear plaintiffs' case differed substantially from the current state of citizen suit eligibility and standard industry practice. First, prior to *Neighbors v. Vulcan*, citizen suits under EPCRA for "past violations" had been upheld as constitutional. It was reasoned that while most environmental statutes authorized suits alleging a defendant to "be in violation" of the statute, EPCRA authorizes suit against parties for failure to "complete and submit" certain information.<sup>41</sup> Congressionally-mandated deadlines for filing would therefore prove meaningless, according to an early ruling on the matter, if a defendant could simply file information

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77-135. The number of 60 day notices sent for environmental citizen suits grew from 6 in 1981 to nearly 300 by the early 1990's.

<sup>36</sup> Section 326.

<sup>37</sup> Hydrochloric acid is listed as a CERCLA hazardous substance at 40 CFR 302 (Table 302.4) and as a hazardous chemical under sections 311(e) and 329(5) of EPCRA, 42 U.S.C. §§ 11021(e) and 11049(5).

<sup>38</sup> Such notice is required to contain information listed in Section 304(b) and (c) of EPCRA, 42 U.S.C. § 11004(b) and (c).

<sup>39</sup> Plaintiffs' Original Complaint, *Supra* note 30. Residents were familiar with EPCRA and the purpose of community right-to-know legislation. They sent four letters to Vulcan asking for such information as "what time this happened, why it happened, how long it took to clean up, and who was the person on-site, how does he receive training, we want a copy of your emergency plan and that kind of information." After hearing no response the first time, the second letter focused on the same request and Vulcan's legal obligation to report the events surrounding the HCL incident to the community. After a third letter which indicated that the community was willing to file suit under EPCRA, the residents finally received a reply. The response listed that Vulcan had carried out what it had assumed would sufficiently meet its reporting requirements, such as reporting to the EPA, the state, and others. A fourth letter emphasized that these activities did not constitute sufficient reporting. After receiving no response within 30 days of the third letter, residents submitted their 60 notice of intent to sue.

<sup>40</sup> Randall M. Weiner, Senior Attorney, Land and Water Fund of the Rockies to William Grayson, Jr., President, Vulcan Materials Company and P.F. Anschutz, President, Southern Pacific Rail Corporation, July 13, 1995.

<sup>41</sup> *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.*, 772 F. Supp. 745 (W.D.N.Y. 1991).

after receiving a notice of intent to sue.<sup>42</sup> While *Neighbors v. Vulcan* was ongoing, the Seventh Circuit permitted a citizen suit under EPCRA, holding that the statute required a different analysis from other environmental laws.<sup>43</sup> Following the resolution of *Neighbors*, however, the Supreme Court held that plaintiffs in *Steel Co. v. Citizens for a Better Environment* lacked a “redressable injury,” because the Chicago Steel Company had filed, after the fact, seven years’ worth of usage reports for the HCL that it used to remove rust from steel.<sup>44</sup> This ruling essentially gave companies the chance to file their past due information before the expiration of a 60-day notice period, rendering citizen suits over EPCRA reporting requirements useless. Companies such as Vulcan, when faced with a similar 60-day notice today, would aggressively seek to meet all reporting requirements. Thus, the plaintiffs’ bargaining position in *Neighbors* as the case moved from litigation to mediation was considerably stronger than it would be today under similar circumstances.

It is also important to remember that EPCRA contains provisions for both reporting the presence and use of hazardous chemicals *and* taking steps to ensure that localities, in coordination with state and federal agencies, can respond to a release. Both were the focus of grievances shared among residents attending community forums following the accident. Indeed, the March 30 community meeting ended with an agreement to discuss a more specific evacuation plan for the area.<sup>45</sup> The “emergency planning” component of EPCRA that deals with such concerns requires the establishment of national, state, and local commissions to prepare emergency response plans to be implemented in the event of a release.<sup>46</sup> The governor of each state is charged with creating a “state emergency response commission” (SERC), to include those with “technical expertise in the emergency response field.”<sup>47</sup> SERCs are then required to designate emergency planning districts that will aid in the development and implementation of emergency plans,<sup>48</sup> and to create “local emergency planning committees” (LEPCs) to develop plans for chemical emergencies, receive reports and notifications required by EPCRA, and make these reports available to the public.<sup>49</sup> Given the presence of one or more “extremely hazardous substances” in the community, SERCs and LEPCs write emergency response plans, which must include several kinds of information.<sup>50</sup> Plaintiffs’ representation, while aware of the fact that many localities

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<sup>42</sup> *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 86 (1998).

<sup>43</sup> *Ibid* at 109-110.

<sup>44</sup> *Steel Co.*, 523 U.S. at 87-88.

<sup>45</sup> *Supra* note 28.

<sup>46</sup> 42 U.S.C. §§ 11001-11005.

<sup>47</sup> 42 U.S.C. § 11001(a).

<sup>48</sup> 42 U.S.C. § 11001(b).

<sup>49</sup> Kuszaj, J. (1997). *The EPCRA Compliance Manual*. American Bar Association Section of Natural Resources, Energy, and Environmental Law, p. 15.

<sup>50</sup> 42 U.S.C. § 11003(c) requires the following: (a) facilities where hazardous substances are stored or used and routes used to transport these substances, (b) procedures to be followed in the event of a release of the substance (to include responsibilities of owners, operators, and medical personnel), (c) designation of a community emergency coordinator, (d) procedures for providing prompt notice of a release to the public and to key personnel, (e) methods for determining the occurrence of a release and the population affected, (f) descriptions of emergency equipment and facilities in the community and identification of those who are responsible for such equipment at each facility, (g) evacuation plans and alternative traffic routes, (h)

(possibly including Denver, where the Fire Department served as the custodian of many of the EPCRA-mandated documents) were slow to develop their emergency response plans, chose to focus instead on the notification requirements of EPCRA.<sup>51</sup>

As with many environmental disputes, this conflict had the potential to follow a model of regulation where one party (EPA Region VIII) chooses to regulate prior to another (citizens using the citizen suit provision of EPCRA), reducing the chance that the second party will achieve their intended outcome.<sup>52</sup> Roughly four months after the HCL spill, the EPA Region VIII filed an administrative complaint under Section 103(a) of CERCLA against Vulcan. Under CERCLA, the person in charge of a facility utilizing hazardous substances must notify the National Response Center immediately following knowledge of the release of a substance in an amount equal to or greater than reportable quantities.<sup>53</sup> Failure to notify the NRC can result in penalties as high as \$25,000 for each day a violation continues under CERCLA. The two parties entered into negotiations and Vulcan agreed to pay \$844 in civil penalties while entering into a Supplemental Environmental Project to assist the Denver Fire Prevention Bureau in meeting its EPCRA obligations (a project to cost no less than \$3,163). Following the issuance of a Consent Agreement between EPA and Vulcan,<sup>54</sup> the residents filed a citizen suit under Section 326 of EPCRA. While EPCRA's citizen suit provision gives residents a mechanism for ensuring compliance with the statute, the extent to which the statute's requirements differed from CERCLA's was subject to interpretation. Defendants in turn suggested that settlement under CERCLA with the EPA precluded the resolution of EPCRA claims.<sup>55</sup> Plaintiffs attempted to show that CERCLA only addressed Vulcan's responsibility to the government, while EPCRA required a series of additional steps including a specific, post-accident, written explanation of what happened, why, and steps that individuals should take to prevent reoccurrence.<sup>56</sup>

A complicating factor in the litigation involved questions of ownership and liability, as defendants GATX, GATX Capital, and Vulcan sought to prove that reasonable discretion and responsibility for preventing accidents fell upon each other.<sup>57</sup>

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training programs for emergency planning personnel, and (h) methods and schedules for exercising the emergency plan.

<sup>51</sup> Interview with Attorney, March 6, 2002, in Boulder, CO.

<sup>52</sup> While citizens filed their notice and intent to sue on July 13, 1995, they had to contend with the fact that a consent agreement had already been reached between the EPA and Vulcan when their complaint was filed.

<sup>53</sup> Long, V. (1999). The complexity and lack of incentives in the release reporting requirements of CERCLA Section 103. *Virginia Environmental Law Journal*, 18: 245-278.

<sup>54</sup> Shortly thereafter, a Consent Order was issued pursuant to Section 109 of CERCLA on October 4, 1995. Consent Agreement, United States Environmental Protection Agency Region VIII v. Vulcan Materials Company, CERCLA-VIII-95-25, October 2, 1995.

<sup>55</sup> Opposition to Vulcan Materials Company's Motion to Dismiss, Neighbors v. Vulcan. CA 95-D-2617 (N.Co. 1996).

<sup>56</sup> *Ibid.*

<sup>57</sup> Answer by General American Transportation Corporation and GATX Capital Corporation, Neighbors v. Vulcan. CA 95-D-2617 (No.C. 1995); Brief in Support of Motion for Summary Judgment by General American Transportation Corporation and GATX Capital Corporation, Neighbors v. Vulcan. CA 95-D-2617 (No.C. 1996).

*Elements of Dispute Resolution Process.* Mediation was proposed by Vulcan Materials after the Court granted summary judgment to GATX and GATX Capital while finding that plaintiffs' suit was not barred by the existing Consent Agreement between the EPA and Vulcan.<sup>58</sup> It was the first time a community was granted standing to sue in an EPCRA case. Parties filed motions for extension of time to answer the citizens' complaint while attempting to engage a mediation process. An experienced mediation firm, CDR Associates, was chosen to provide neutral assistance throughout. The decision to agree to move forward with the mediation was made by at least several of the plaintiffs, who believed that the forum was better suited for reaching their objectives, which in part could not be achieved through litigation:

The other thing that is most fundamental to any of this is we went in that door saying there are several things that we want and money is not in the top five. We want those people to understand who we are, we want those people to learn about our community, we want those people to have some sense of what they did and who they harmed. We don't want to sit down here and say there was a spill, give us money. We want them to walk out of this room and understand that there are living human beings here and children and a community and a way of life that was disrupted and that money isn't the answer. What really is going on here is that there's this total disconnect from them, the company and what they do and the fact that they are a neighbor to us, they're in our neighborhood, they're in our community, and yet they're totally disrespectful. Not in the spill. When they move in here and they don't bother to meet you and they don't bother to talk to you and they don't come to the community association meetings and it's like you don't even know they're there until they spill 3000 pounds of HCL on you. You know, that's what we wanted, that somehow or another we should become human to these people. We are human beings and we have children and we have lives and that we're not to be discounted. And that was our major goal there, that we had to touch these people, we had to get inside of those human beings and to help them to see other human beings, not adversaries, not those colored folks, we needed them to see human beings who were vital and valuable. And that was our goal. And we discussed it and we planned it and we had done it before and we knew what we were doing, and that was clear to our attorneys, too.<sup>59</sup>

Pre-mediation. An overview of the pre-mediation phase of the process appears in Table 2. The primary objectives of this phase were to (a) agree to mediate, (b) choose and legitimize representatives for each side, including the mediation team, (c) internally develop objectives, and (d) begin to shape the process through interaction with the mediation team as they assessed the conflict and representational issues, culminating in the drafting of groundrules and an agenda for the process. Each of these elements was mutually reinforcing, particularly from the perspective of local residents. By agreeing to mediate, plaintiffs expressed a desire to move beyond punishment of an isolated incident to an *understanding* of the dynamics which were prevalent throughout the entire community and could lead to potentially more serious threats to their safety. Such an understanding would affect not only Swansea-Elyria but communities located near scores of other railroad terminals, tanker storage sites, and other chemical operations. Further, plaintiffs recognized and communicated through meetings with NTFC, CCC, and United Swansea members that tangible benefits to the broader community could not be achieved through litigation, as the cause of action in *Neighbors v. Vulcan* was linked to a limited

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<sup>58</sup> Memorandum Opinion and Order, *Neighbors v. Vulcan*. CA 95-D-2617 (N.Co. 1997).

<sup>59</sup> Interview with Swansea resident, March 5, 2002 in Swansea.

set of possible court-imposed remedies pertaining to a specific site. That said, it was also accepted that mediation would *supplement* and not replace adjudication of residents' claims, should the former prove ineffective. As residents developed a shared sense of mediation's potential, their actions communicated legitimacy to Vulcan and CDR Associates, the non-profit mediation firm that was ultimately agreed upon.

Initially, the mediators sought to assess (through interviews and discussions with each party) the appropriateness of representatives and their willingness to attempt mediation and work with the proposed mediation team. This process culminated in the convening of a first meeting and agreement over the appropriate venue and space, drafting of groundrules that would guide conversation and the actions of parties during and after each session, and drafting of an agenda for Day 1. The groundrules are instructive in the context of resident reactions to the proposed process. Residents, during pre-mediation forums, expressed their strong doubts about the possibility of settlement:

They were all in favor of it. They were also skeptical of it, because all of them were some older folks that had been doing it and they said we've been fighting these battles since the highways cut the neighborhood in half. The railroads were expanding and different things happening. The businesses that were expanding and the housing going away. The National Western Stock Show was expanding and it took up half the housing stock out of Elyria and Elyria was almost left with nothing as far as housing stock goes. So people were really, what they were saying was we're glad that you're able to understand this stuff, because we're certainly not understanding a lot of these things, they're too technical for us, and we really want you to take on the issue and take on the fight but we want to say that you're spinning your wheels. We fought these battles with the city, and it doesn't matter what you do. The people with the money and the city, and those are usually in the same seat, they're going to do what they want to do anyway. So you're going to spend a lot of time, get a lot of people excited, and you're going to end up with nothing.<sup>60</sup>

With the views of the broader community in mind, plaintiffs expected the mediation team to provide a space in which historic power imbalances would be neutralized, at least in part, while the strength of other options such as adjudication were preserved. Plaintiffs had a good sense of the various tactics that could be used during negotiation and importantly, which could be addressed through the structuring of the process and which they would have to identify and counter on their own. The groundrules and agenda for Day 1 provided some of the assurance plaintiffs were looking for: information would not be shared or influence court proceedings, media interaction was limited to joint statements, plaintiffs' desire to be understood and respected as human beings was agenda item one, plaintiffs' need to understand the circumstances surrounding the incident was agenda item two, attorneys, whose objectives at times ran counter to those of their clients, were given a limited, clarifying and informational role, and expectations for resolution were built around the need to address EPCRA and the residents' "sense of harm."

The meetings were scheduled for a small rental office space with breakout rooms and secure telephone access to those with decision-making authority for Vulcan, after suggestions for holding the sessions at CDR, CCC, or the basement of a local Presbyterian church were rejected. The Spartan setting served to magnify expressions of "righteous anger" by plaintiffs and blunt statements by defendants without attaching them to certain symbols that non-neutral spaces might suggest. This encouraged the parties to move from earlier stages of anger and defensiveness to an expression of shared interests,

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<sup>60</sup> Interview of Swansea resident, March 8, 2002 in Swansea.

which would begin toward the end of the first meeting. The absence of other parties such as those involved in emergency planning and response activities limited distractions to the central group dynamic at work: the transition from interests in acknowledgement, accountability, and recognition, which were infused with strong emotions and historically significant issues, to problem-solving and relationship-building based on linked issues and forward-leaning time horizons.

Table 2. *Neighbors v. Vulcan* Mediation Elements: Pre-Mediation.

Element	Residents	Vulcan	Mediators
Initiation	60 day notice of intent to sue indicates that the Land and Water Fund of the Rockies, representing plaintiffs, “has a policy of pursuing negotiation whenever possible” and invites Vulcan to “discuss with us your compliance with the Act”	Executives, through counsel, Land and Water attorneys after community was granted standing to sue under EPCRA; suggested the Keystone Center, with who they had set up CAP’s in the past	Was contacted by Vulcan after residents declined their suggestion of using the Keystone Center
Assessment	Investigated 2-3 firms that were mentioned; attempted to find mediators of color but were unsuccessful; knew at least one mediator from CDR Associates and accepted assurances from counsel as to competence of CDR Associates	Tried to learn more about the community organizations involved; accepted assurances from Keystone Center as to competence of CDR Associates	Informal interviews by phone (Vulcan management in AL) and in person (CCC) to determine a) if residents wanted to pursue negotiation, b) if they wanted a mediator to help out, and c) if they wanted to use CDR Associates
Representation	Executive Director, Cross Community Coalition and President, United Swansea (attendance by 2-3 other plaintiffs who didn’t actively participate); Counsel (2 attorneys)	Manager of Public Affairs, Chemicals Group of Vulcan Materials; Director, Logistics in Chemicals Group; Counsel (1 corporate and 1 outside counsel); on-site employee (present at first meeting only)	Mediation team consisting of two senior mediators (one of whom was an attorney)
Rationale for Representation	Previous experience with community organizing over ASARCO, medical waste incinerator, waste transfer station, etc.; had organized community forums for this and other incidents (attendance in the 100s); could contact 2200 homes within one day; had met with Neighbors members, CCC members, and Swansea neighborhood association for approval of their involvement	Substantial experience with negotiation and mediated dispute resolution; experience with CAPs; Logistics Director communicated directly to President of Chemicals Group who reported to Corporation Board Chairman	Balance of legal and process expertise; substantial experience with mediating community and environmental disputes; provided references from previous environmental disputes involving communities of color

Element	Residents	Vulcan	Mediators
Objectives	<p>Vulcan has to “own” its mistakes; has to learn about neighboring communities; has to offer a settlement; settlement will NOT be divided among plaintiffs (must serve broader community); settlement must specific about what settlement is for</p> <p>Counsel: Add legitimacy to clients by signaling competence, aggressiveness when necessary</p>	<p>Protect reputation; protect shareholder value by limiting settlement value (potential penalties were significant); apologize to legitimate representatives of the community; (later) understand why Vulcan’s actions were considered offensive and inadequate</p> <p>Counsel: Protect shareholder value by arguing that Vulcan had taken sufficient steps following incident; protect broader corporation from precedents that would require costly changes elsewhere</p>	<p>Explore possibility of settlement without transformation of clients or their relationships; provide sufficient time for airing and understanding of grievances</p>
Groundrules	<ol style="list-style-type: none"> <li>1. No statements will be provided to the media during mediation</li> <li>2. Goal is to release a joint statement to the media after successful conclusion of the case and to provide information to satisfy the community’s need to know what happened during incident</li> <li>3. Resolutions will be framed to make regulatory sense under EPCRA and will address the community’s sense of harm</li> <li>4. Agenda will proceed from understanding each group’s background and shared information to hearing each group’s general interests and perspectives and to then to proposals for resolution</li> <li>5. Parties’ attorneys are welcome to attend and participate. However the focus of the process will be the principle, primary parties</li> <li>6. People will avoid interruptions, try to avoid repetitions, and will show respect</li> <li>7. Anything said during mediation will not be admissible in court in the event no agreement is reached</li> </ol>		

Mediation. The plaintiffs entered the mediation phase well-prepared to frame the discussions around the need to redress “damage done to the community” while treating the HCL spill and delays in evacuation and notification as *symptoms* of broader causes of that damage. The challenge came in convincing Vulcan that their interests in addressing wider-ranging conditions overlapped with the community’s. Ironically, it was the early discovery that Vulcan had decided to close the terminal in Swansea and leave the area, and the company’s rationale for doing so, that allowed the group to transition to future relations and problem solving around community-industry dynamics and needs.

In the early 1980’s, the facility in question employed two staff members.<sup>61</sup> Economic conditions led Vulcan to reduce its on-site staff to one terminal operator. In the fall of 1994, Vulcan determined that the site was no longer economical, and that leaving one staff person on site was not safe for the employee or the operation. In addition, vandalism, theft of guard dogs, and shooting at the railroad cars were reported. Vulcan declared the site unsafe and on February 2, 1995 an action plan to close the site

<sup>61</sup> Mediation notes recited during Interview with Mediator, March 7, 2002 in Boulder.

was put together. Less than two months later, the HCL incident occurred. It became apparent early in the first mediation session that the concerns which led Vulcan to close its operations were shared by local residents, who were also given substantial time, without interruption, to offer their account of the community in general as well as the accident.<sup>62</sup>

In the neighborhood association, a lot of concerns would come up. We started noticing that there were a lot of things that were going on in the park that were changing. Our community was in a big change, there were lots of folks that lived around there that their families had been there 20, 30 years, and so people were quite concerned when we started hearing some of the things that were going on in the neighborhood and that led us to concerns that were concerns of the park. And those were, that a lot of the old families were moving out and we were getting lots of new people. And a lot of the new people coming in were Mexican nationals. And so we were getting a lot more kids in the neighborhood, a lot more families into the neighborhood and the neighborhood was growing quite rapidly. But with that, some of the things that they had done back home were becoming evident that they were doing that here as well. And a lot of that was guns. On Saturday evenings, Friday evenings, five or six of the men would be sitting outside the house, just sitting around drinking, and there were certain areas that are kind of isolated that are close to the tracks that dead end, and lots of rental houses. So people living in those areas would be drinking in the evening and later in the evening they would be a little bit drunk and we had a lot of reports of gunfire going off, gunfire firing around the park area and at the ends of those dead end streets adjacent to the train tracks.<sup>63</sup>

These concerns were linked to Vulcan's during the first mediation session by the plaintiffs:

Companies like yours they come in, they plant down, they put up fences, they buy the dogs, and it's a message to us of how bad are we. How awful are we. How horrible are we that we must be locked out and have dogs in case we come near your site and that's the message that you send. And it's a bad message. You make no effort to know us. We're your neighbors for pete's sake. You know, there are houses not two feet away from where this spill happened. People living there, children living there, and you don't come over and say hello. You don't come to the neighborhood association as other companies have and say we're so and so, this is where we're housed, we wanted to let you know about us. You don't come to the family center and say we have jobs, we'd like to post it with you to employ people. You set down there with some of the most dangerous chemicals in the world, put up your walls and buy your dogs, ignore us and then are surprised when something like this happens, that we say we'll take you to court. What's the surprise? There's no relationship. If you were to respect people, treat them with respect, you would come to the neighborhood association meetings, we'd say let's see your emergency plan and go over it, let's have an evacuation plan and go over it, let's make sure that we keep in contact, you'd have maybe one or two folks from the community working there. We would have a relationship so that when the accident happens we could look at each other and say hey, we know how to deal with it. Then we'd sit down later and say how did the accident happen, how could it be prevented. Not only would we not end up in court, we could learn from that, we could be in a better position, but you totally discount us. "Well, you know we have heard a lot of things in this neighborhood you know like gangs and the people that were shooting, whatever...Does this neighborhood have troubles? You bet they do. Like any other neighborhood, especially low-income neighborhoods. We have our share of gangs. People do steal, do they not? You bet they do. And does that happen in every industrial area in this country? You bet it does. But you know,

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<sup>62</sup> The mediation team focused early discussion on "what the community looked like" apart from how they were affected by the HCL spill, the residents' account of the spill, and Vulcan's account of what it was like to operate the terminal and deal with the spill. *Ibid.*

<sup>63</sup> *Supra* note 59.

the thing that's going on here is that you see us as the other, and we are not the other. Don't you know that one of our greatest fears in life is that one of these gang members is gonna take a shot at one of those tanker cars and it's gonna blow up?<sup>64</sup>

Accounts of the first session suggest that it was this linkage of facility operations to neighborhood safety that led to considerations of how Vulcan could prevent such occurrences in the future at other sites. Some suggest that Vulcan's initial response to the possibility of residents helping to protect site operations from vandalism was in fact hostile. Others say that there was a moment where both sides realized the extent to which they were dependent upon one another, despite their previous lack of awareness of this fact. In either case, this pivotal moment shifted the focus from historic problems to improving community relations at other sites and protecting residents from adjacent industries. Residents were well-prepared to discuss both issues and to offer solutions that would form the basis for settlement of *Neighbors v. Vulcan*.

Vulcan's decision to close the terminal and the fact that the HCL spill was not an ongoing threat shifted Vulcan's focus to other sites while freeing residents to focus on broader community problems. After an initial offer which Vulcan had been authorized to make to plaintiffs (\$10,000) was resoundingly rejected, the parties began to draft principles of settlement. Parties began to work under conditions of greater mutual respect, which was encouraged by the limited role granted attorneys, parties' candid accounts of living and working conditions, and Vulcan representatives' admissions of past errors (made easier by the fact that these admissions had already been made in settling the EPA's administrative action) and even apology for the entire incident. The principles were:

1. The community should know what happened during the mediation
2. The community should know of Vulcan's apology in that it shows respect to the people of the community
3. Information regarding what happened during the spill and any health impacts that could result should be made clear to the community
4. Vulcan should have an opportunity to repair its reputation within the community by being given access to the community
5. This experience should somehow inform other communities and be a model for improving processes (preventive as well as emergency preparedness) that would be helpful to both sides
6. An agreement that is seen as fair by both sides would include a dismissal of the lawsuit with prejudice
7. The settlement agreement will require oversight. Dismissal of the lawsuit will therefore include court oversight and enforcement
8. Parties should consider a supplemental environmental project as part of settlement<sup>65</sup>

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<sup>64</sup> *Supra* note 58.

<sup>65</sup> Mediation notes recited during Interview with Mediator, *Supra* note 60.

At this point, residents revealed what was indeed a strong vision for a suitable remedy under the final principle. In the early 1990's, the community had held a needs assessment and a three day charette in order to draft a neighborhood plan for Swansea. Coincidentally, the area near Vulcan's former operations was heavily dominated by industry. At the corner of 51<sup>st</sup> and Steele Streets was the last piece of green space (roughly two acres) in the area, behind which stood residential homes. Residents had suggested that the parcels be converted to a neighborhood park so that a buffer zone separating homes and industry could be created through use of shrubbery and fencing. In

addition, the City of Denver had leased land in North Swansea to a number of trucking companies at below-market rates. Near the trucking facilities lies a mobile home park that lacks even a foot of green space and at the time housed 88 children. The children were forced to play in the streets, which

continued to see heavy truck traffic. Plaintiffs made use of this story, in addition to a wealth of materials, photos, and plans to argue for the need to acquire the 51<sup>st</sup> Street site and convert it to a park. Their proposal included demographic data, information on land use trends and toxics release data for the zip code, and a diagram of the proposed park with two options for acquiring the site.<sup>66</sup> Parties agreed to gather additional data between the first and second mediation sessions, in order to more carefully consider the park option.

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<sup>66</sup> Cross Community Coalition, Swansea Community Park Project Proposal (no date).

Between September 19<sup>th</sup> and October 13<sup>th</sup>, 1997, the parties engaged the idea of a park through various forms of data gathering. The proposed park was the westernmost half plot of a 174,000 square foot plot owned by Sam's Produce, Inc. Initially, Sam's was not interested in selling the property, although it appeared that if the plaintiffs could develop a proposal for a park that would benefit children and other people in the community it might be accepted. It was also necessary to get the City's buy-in to the idea of preserving the parcel as open space.

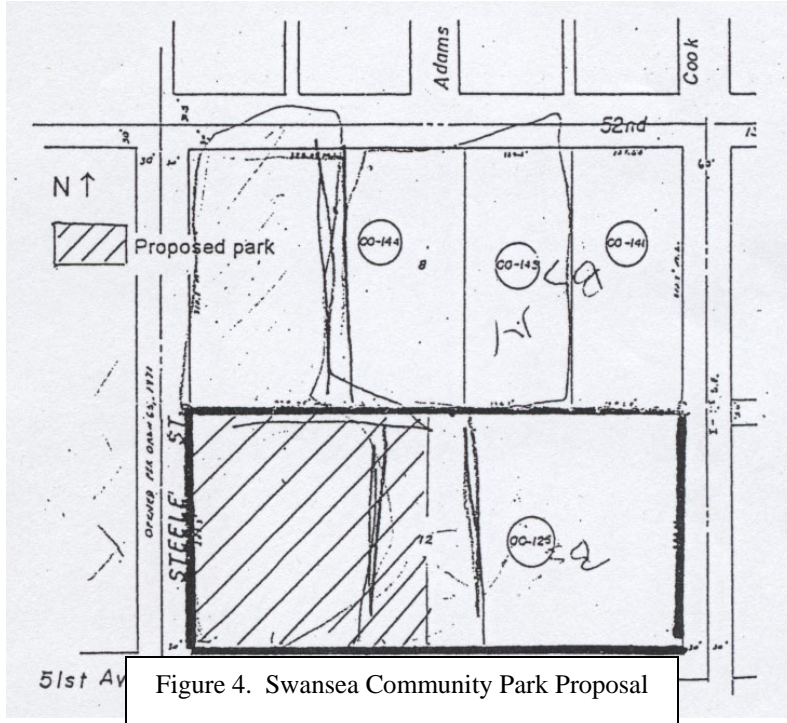


Figure 4. Swansea Community Park Proposal

These were activities that required the due diligence of the plaintiffs. In addition, plaintiffs held another round of community forums and conducted a door-to-door survey, where they found that there were 265 children within a two block radius of the park (80% of whom were under 12). Within the 143 homes surveyed, 109 agreed to help with park planning and 114 agreed to work with police to ensure that the park remained a safe place for children.

Vulcan also began to investigate the implications of a park for settlement. Its outside counsel, based in Denver, looked at the property and comparable values, talked to realtors to determine a fair amount to contribute toward the purchase of the property, tried to figure out how it could be assured that a park would one day be sited in perpetuity on the plot of land, and found out whether those on the city council supported the idea. It was important for the Vulcan representatives to be convinced of the feasibility of the proposal, so that they could approach upper management and seek additional funds.

The Agreement. On October 13<sup>th</sup>, the parties met for a second session. By this point, the parties were focused on problem-solving, based on “mutual understanding” and “respect.” The proposed remedy, tied to the cumulative effects of industry, was within the realm of possibility while plaintiffs had already pledged to help Vulcan consider community relations at its remaining sites. What remained was for one of the parties (or the mediators) to make another offer. An earlier offer by Vulcan had not served to anchor plaintiffs’ expectations of an appropriate amount. Residents had entered the mediation in agreement over the priorities of relationship-building and prevention. Still, they had discussed the need to have a “walk-away” figure, which was in the range of \$75-100,000. This would purchase a significant portion of the land and could be

leveraged by the plaintiffs to seek grant and city council assistance. After both sides presented their information regarding park feasibility and reported on their meetings with outside people, Vulcan declared that it had a final offer to make:

Joy, who had the ear of the president of the Corporation, had parameters that she knew that she could go, from one to the other. Well, I think it went up to [undisclosed amount]. And her lawyers still were saying you have no need to do that, it would not be a good idea to do that, it would set a bad precedent. It's a bad idea...And at some point, Joy just sat on the edge of her chair and said do you know what, I'd like to offer you [undisclosed amount]. And you could hear a pin. At which point everybody said let's take a break. And it was, she wanted to do it. She felt as though what they had done had caused harm in a way that their lawyers couldn't get. She got it, and she just wanted to do it, so she did it.<sup>67</sup>

Plaintiffs returned and accepted the offer, whereupon Vulcan asked for their help in developing a blueprint for future community relations. The remainder of the meeting was used to settle a disagreement over attorneys fees and to draft the specific language of the Settlement Agreement, an Escrow Agreement, an Additional Settlement Agreement, and a Stipulation of Dismissal of the litigation.<sup>68</sup> These documents were finalized at a later date and signed by all parties to the litigation. The major elements of the Settlement Agreement are listed below:

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<sup>67</sup> *Supra* note 60.

<sup>68</sup> Exhibits to Order, Neighbors v. Vulcan. CA-95-D-2617 (No.C. 1997).

Table 3. *Neighbors v. Vulcan* Settlement Elements

Element
Court has jurisdiction over the Parties and the subject matter of this action pursuant to EPCRA
Undersigned representatives certify that they are authorized by their organizations to enter into these terms and conditions
Agreement applies to the parties, their directors, officers, employees, members, successors, and assigns
Settlement does not constitute an admission or evidence of wrongdoing or misconduct or liability on the part of Vulcan, nor shall it be admitted in any proceeding against any party except in a proceeding to enforce the Settlement Agreement
Before December 4, 1997, Vulcan will deposit with an Escrow Agent of the Swansea Community Park Project the sum of \$125,000 to be used for purposes of purchasing an interest in and/or developing land to establish a public park or making other improvements to public lands for recreational purposes within the Swansea neighborhood
Pursuant to an Additional Settlement Agreement, Vulcan will contribute an additional amount to be used for like purposes
Details of specific expenditures of the Escrow Property will be determined by majority vote of individuals comprising the Plaintiffs (CCC-one vote, NTFC-one vote, individual members of Plaintiff party-one vote); Escrow Agent must abide by the directions given by representatives of the Plaintiffs
Parties will endorse and file with the Court a joint Stipulation (copy attached), asking the Court to dismiss all claims with prejudice, to which a copy of this Agreement shall be attached
Vulcan will reimburse Neighbors \$35,000 for expenses, attorneys' fees, and costs incurred in connection with the legal action
Parties will use their best efforts to draft a joint press release to announce the resolution of this matter. An additional press conference will be held when a final decision is made on the use of funds held in escrow for the Swansea Community Park Project
Parties will meet at the CCC together with Transcare State and Regional Coordinators to begin the process of drafting protocols for ongoing work with the community. Goals shall include providing guidance to industry for their work with other communities, as well as guidance for how communities might work together with industry using the factual backdrop of the action as an example
Plaintiffs forever release, discharge, and acquit Vulcan and its owners, successors, shareholders, employees, agents, directors, officers, attorneys, predecessors, assigns, representatives, and affiliates including subsidiaries from any claims, demands, liabilities, rights, actions, causes of action which Plaintiff Parties have against Vulcan which relate to the Action and were asserted or could have been asserted under EPCRA, CERCLA, or any other federal or state environmental statute or regulation. This does not release any claim, if one exists, which Plaintiff Parties may have for any personal injury arising out of the alleged release of hazardous substances at the facility
This agreement and the Additional Settlement Agreement constitute the entire agreement between the parties
Parties represent that each enters into this agreement upon legal advice of their attorney and that they fully understand and voluntarily accept the terms of the agreement
This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns
This Agreement may be executed in one or more counterparts. All counterparts shall be deemed to be one and the same instrument

Implementation presented its own set of challenges, although the agreement was rather straightforward. The CCC wrote a grant for \$180,000 to cover the additional cost of the land, which it had planned to do even before the agreement was reached. The undisclosed sum sat in escrow for several years and accrued interest, leaving the community in need of just \$18,000 before they could purchase the property at fair market value. Through the City Council, the CCC convinced the Parks and Recreation

Committee to give them the remaining funds that they needed. The parcel has been purchased, and the National Park Service is helping CCC and City brownfields workers to determine if the site is contaminated. Amazingly, the site, located within an area that is almost universally contaminated by some level of lead or arsenic, appears free from these substances.<sup>69</sup> Groundbreaking on the park will happen in the near future.

Meanwhile, plaintiffs and Vulcan worked to draft *A Blueprint for Community Relations and Involvement*, a guide to community outreach that has been widely distributed.<sup>70</sup> The document includes detailed steps for companies just starting to communicate with their host communities, including guiding principals for community involvement that mirror many of the lessons learned during the mediation process. Parties also made several presentations, to an annual meeting of the Society of Professionals in Dispute Resolution, to senior attorneys for the Chemical Manufacturers Association, and other smaller venues. Vulcan took at least some of the recommendations listed in the *Blueprint* seriously:

We have since shut down some terminals and re-evaluated some locations as a result of this because we felt like there were potential risks that outweighed the benefit of having those and that we wouldn't be able to do the kinds of things there that were needed to ensure that we were basically not going to have a situation like this again, or if one happened that we would be able to address it...Another thing I think is that we learned out of this, that companies need to do a better job of figuring out who the stakeholders are and being more aggressive in seeking out problem spots and frankly we had a lot of success under our belt with advisory panels but our model was really limited to manufacturing sites and we – you just can't ever get complacent in that arena.<sup>71</sup>

*Discussion.* In communities such as Swansea-Elyria, multiple, overlapping sources of environmental risk, and the timing required to address quality of life issues can serve as sources of strength when grievances against a limited set of polluters are addressed. The manner in which *Neighbors v. Vulcan* was settled suggests that environmental justice organizations can and should consider, prepare for, and *shape* a mediated process so that their comparative advantages are leveraged to the fullest extent possible. These advantages include: (a) knowledge of community needs and the ability to mobilize consent around new ideas and proposals, (b) an understanding of the interconnectedness of environmental hazards, the dynamics behind their common location within a given place, and ways in which they can be mitigated or reduced (c) an intimate understanding of how common mistakes and accidents that are taken for granted in industrial society affect people's daily lives, and (d) connections to local officials and political leaders that may not be shared by industries, particularly those managed from out of state. Traditional means of resolving environmental disputes (i.e., hearing processes, adjudication) do not give community groups a chance to make use of these advantages, because they concern a narrowly constructed set of questions of fact or law that minimize the value of brainstorming, joint fact-finding, or inventiveness and restrict parties to consideration of an isolated, ongoing incident. Pursuing environmental justice, on the other hand, requires that attention be turned toward multiple sites, longer time

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<sup>69</sup> *Supra* note 58.

<sup>70</sup> Granado, L. (1997). *A Blueprint for Community Relations and Involvement*. Published jointly by the Cross Community Coalition and Vulcan Chemicals.

<sup>71</sup> Interview with Vulcan corporate official, *Supra* note 18.

horizons and slow-moving processes of change that need to be set in motion. If carefully structured, mediation can give community representatives a chance to think about and address the broader challenges that will remain, regardless of the outcome of the matter at hand.

To accomplish this in *Neighbors v. Vulcan*, plaintiffs had to shape the process, including the role of the mediators. This involved considerable preparation, including years of assessing community needs and developing plans and proposals, with multiple options for future site development before the dispute even materialized. It included the development of strong networks to overlapping communities of *interest* (older residents involved in the first wave of environmental struggles surrounding I-70, residents involved in organizing around the ASARCO/Globe site, neighborhood associations, and family service providers) that could be assembled within a short period of time. It required legitimation of their position as representatives of these overlapping communities and proponents of solutions that would satisfy a broader set of interests than their own. And it called for highly articulate leaders who could focus the agenda, groundrules, and discussions on appreciating past events *for the purpose* of focusing on relationships and remedies tied to cumulative effects of industry or prevention on a scale broader than the site in question.

The overlapping concerns for site safety (protecting operations and lives), once aired, marked this transition from appreciating past events to broader mitigation and prevention work. It was the mediation *space*, beyond any actions of the mediation team, that gave parties a chance to move in this direction. But while the mediation team did not plan on transforming relationships between parties, it did work at the margins to ensure that the parties' interests could eventually be addressed in a constructive manner: attorneys were given a limited yet important role to play (information, party and process legitimation when necessary), uninterrupted opportunities for the community to share its story and prove its competence were scheduled and enforced, and once parties turned to problem-solving, the mediators offered careful documentation and guidance during the due diligence phase. Had the dispute involved more specific aspects of site operations, the mediation team would have been responsible for controlling the pace of conversation and making sure that all sides had access to technical assistance. Beyond this, the community leaders were well aware of negotiation tactics and how to spot and defend against them (i.e., anchoring what the other side expects they will receive by making a first offer, timing and location issues, preconditions to agreement). And they came prepared to discuss solutions that were tied to their intimate knowledge of community needs and political feasibility.

Of course, the unique circumstances of the case (Vulcan had closed the site and there was no on-going threat from their tankers) may seem to suggest that there was no other choice but to direct parties' attention elsewhere. Yet, it is equally true that the community activists involved had only begun to scratch the surface in terms of possible solutions that could have grown out of their comparative advantages. Note that the ultimate solution, a park that would serve as a buffer zone, was tied to the clustering of trucking operations, the specific needs of a mobile home, broader community buy-in and willingness to assist, and broader concerns over industrial zoning in northeast Swansea and the lack of open space. These pieces of a narrative that the residents constructed around the proposed solution are but a few of the dozens that were raised during

interviews. The activities of small metal shops and painting operations in the area, truck traffic, use of the railroad tracks by other industries, terminal surveillance, access to networks that could help in disseminating information during a release, sites that remained open to future industrial development where transfer stations and incinerators had already been defeated, and many others were also aired, and continue to linger in the air, waiting to be skillfully attached to solutions that are forward-thinking and take advantage of the different time horizons of the parties to a dispute (in this case, immediate gains to Vulcan's understanding of community relations and prevention in other communities were linked to delayed but meaningful gains to quality of life in Swansea) Fitting these pieces together requires a flexibility and creativeness that mediation can encourage.

## Windows of Opportunity for Mediation in Swansea-Elyria, Colorado PART II.

Had we had some opportunity to shape that mediation it would not have looked like it did. But given that the situation was already predetermined, we have to be at the table. The only other thing that we could have done to change it would have been to *not* participate – Swansea Resident

*Background.* Environmental justice disputes add distinct layers to existing regulatory, corporate, and industry developments. Communities are increasingly able to maneuver through these realms and understand the extent to which each can contribute to or help resolve risks to resident health and well-being. Yet, problems of judging whether behavioral changes by any given firm will yield noticeable improvements to quality of life at different geographic scales and dealing with this challenge within the context of multiple, overlapping, existing processes can limit the effectiveness of mediation in meeting a community's interests. As the communities of Swansea and Elyria entered into a second mediation regarding air emissions, they were given little time to come to terms with these challenges.

The Conoco Petroleum Refinery<sup>72</sup>, located 1.5 miles northeast of Swansea in nearby Commerce City, was not technically a neighbor, although many of the odor complaints received by the state were from Swansea-Elyria.<sup>73</sup> These complaints peaked in September, 1996 when a disruption in refinery operations resulted in flaring that contained substantial amounts of sulfur dioxide (SO<sub>2</sub>).<sup>74</sup> Conoco would later be accused of violating the Federal Clean Air Act by emitting sulfur dioxide and other compounds (potentially in excess of permit limits) and flaring certain gasses in violation of permit conditions.<sup>75</sup> Litigation was initiated by the Colorado Public Interest Research Group (COPIRG), who had been

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<sup>72</sup> The Conoco Refinery has the capacity to process approximately 57,500 barrels of oil per day. The refining process involves separating hydrocarbons from crude oil and converting them into products. Crude oil, which contains a variety of toxins and impurities (such as sulfur), is first heated in a distillation column. This process causes various gasses to rise through the distillation column where they cool down and form liquids that move through piping and are used for various products (fractional distillation): heavy oils condense at the lower level of the column and are used for domestic heating oil, lighter products gather at the middle level and are used for gasoline and kerosene, and some are unable to condense and pass into a vapor recovery unit. The latter are then processed through a process called cracking (the application of either heat or chemicals). A number of toxic substances are released at various stages of the process, such as volatile organic compounds like benzene, toluene, and xylene. Conoco ranked among the highest producers of toxic air emissions in Colorado at the time of this study.

<sup>73</sup> Lorraine Granado, a plaintiff and head of the Cross Community Coalition, lived five blocks from the refinery with two sons at the time. Michael Maes, a plaintiff and head of United Swansea, also lived within the area most immediately impacted by Conoco's violations.

<sup>74</sup> Jerry Heyd, Refinery Manager, Conoco to Hugh Davidson, Air Pollution Control Division, CDPHE, RE: Tri-County/APCD meetings with Conoco on August 13 and 29, 1996, September 12, 1996. ADD

<sup>75</sup> Complaint, COPIRG Citizen Lobby, Lorraine Granado, and Michael Maes v. Conoco, Inc., CA 98-30 (N.Co. 1998).

active in passing the Colorado Clean Air Act in 1992.<sup>76</sup> The CO CAA required industries to more fully disclose their annual emissions through use of Air Pollution Emission Notices (APEN's)<sup>77</sup>, which went above and beyond the EPA's Toxics Release Inventory and gave COPIRG and public interest attorneys a clear suspicion that Conoco was illegally venting sulfur dioxide. The Swansea-Elyria communities became involved as joint plaintiffs with COPIRG on a citizen suit under the CAA.

*The Problem.* COPIRG, an experienced public advocacy organization, had begun to look at stationary sources of air pollution across the state in 1990.<sup>78</sup> They conducted an early assessment of the CAA as it was federally reauthorized in 1990, determining what percentage of emitting sources would be cut through federal statutes. Conoco appeared in the early 1990's in their analyses of the Denver metropolitan area as one of the major sources of air pollution, particularly criteria air pollutants.<sup>79</sup> At the time, its emissions were dwarfed by those of power plants such as Public Service Company (now Excel).<sup>80</sup> COPIRG worked with Environmental Defense and the Land and Water Fund of the Rockies to reach a voluntary agreement with Public Service where the company would receive tax credits for pollution control equipment. This left oil refineries as the largest source of sulfur dioxide and nitrogen oxide emissions in the greater Denver area.

An attorney at the Land and Water Fund of the Rockies, based in Boulder, CO, was also investigating the refinery's activities.<sup>81</sup> His research, based in large part on a review of public documents such as facility permits, focused on the refinery's sulfur recovery operations.

Conoco had two different pollution control devices, #1 and #2. And the refinery according to Conoco needs to operate 24 hours a day, 365 days a year, and yet those pollution control devices need to be shut down for maintenance periodically and sometimes it's for a long period of time. So you would think that OK, it's a redundant system. If you shut down one, then you reroute all the gasses through the second one and when you shut down two you reroute all the gasses through one. For some reason, whether it was one of the devices took liquid as opposed to gas, when they shut down one of these they could not reroute the gasses to the other one, so instead they routed the gasses to a central flare. Now central flaring is something that all refineries have the ability to do for emergency situations but it's a terrible form of releasing. Because flaring doesn't have any pollution control capturing. So you're venting the worst of the worst. So there was significant flaring going on at Conoco when they'd shut the facility.<sup>82</sup>

This problem substantially impacted the refinery's sulfur emissions. Specifically, the Conoco refinery contained two units (sulfur recovery units, or SRU's) where a catalyst is used to break hydrogen sulfide (which is formed when sulfur is removed from crude oil) into elemental sulfur which then solidifies and can be sold. Not all hydrogen sulfide is converted. Some is sent to a "tail gas incinerator" and either flared or burned. This

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<sup>76</sup> Air campaign seeks ballot spot, *Rocky Mountain News*, March 12, 1992; Tough clean-air bill wins approval, *Rocky Mountain News*, May 6, 1992.

<sup>77</sup> See Concept A-1: Elements of a Colorado Air Toxics Strategy, COPIRG Discussion Draft, April 14, 1992; Overview of Hazardous Waste Pollutant APEN Reporting, COPIRG, Denver, CO.

<sup>78</sup> Interview with former COPIRG President, March 4, 2002, in Denver.

<sup>79</sup> *Ibid.*

<sup>80</sup> In 1998, Public Service Company released 18,228 tons of sulfur dioxide while Conoco released 2,498 tons into the atmosphere.

<sup>81</sup> Interview with former Attorney, Land and Water Fund of the Rockies, March 6, 2002, in Boulder.

<sup>82</sup> *Ibid.*

results in a release of sulfur dioxide into the atmosphere during normal operations. Conoco was issued a permit in 1991 to construct and operate a second SRU in order to handle acid gas from a new Gas Oil Hydrodesulfurizer (GOHDS) as well as sour water stripping derivatives.<sup>83</sup> This structural change was part of a larger project to produce low sulfur diesel fuel.<sup>84</sup> The unit experienced operational difficulties, including a period in April 1996 where it was shut down for 20 days. When the SRU shut down, a gas stream was sent to a flare where it generated SO<sub>2</sub>. Venting SO<sub>2</sub> into the atmosphere posed a nuisance and potential health problems to neighboring communities.

Conoco's SRU #2 permit limited the emissions of SO<sub>2</sub> to 85 tons per year and 19.6 pounds per hour, and required "all gas from the sour water stripper shall be processed through the Claus sulfur recovery unit."<sup>85</sup> During maintenance, however, Conoco would shut down its GOHDS while continuing to operate. This would continue to generate a sour water stripper gas stream (containing an estimated 5 tons/day of SO<sub>2</sub>) that would be sent to a flare and vented into the atmosphere.<sup>86</sup> The attorney documented the following incidents of SRU#2 shutdowns and sour water stripper flarings between July 1995 and July 1996 as part of his preliminary analysis:

Table 4. Potential Permit Violations between July 1995 and 1996, Conoco Refinery.<sup>87</sup>

Incident Start Date	Duration (hrs.)	Lbs./hour SO <sub>2</sub> release (est.)	Total SO <sub>2</sub> Released (tons)
October 25, 1995	46.25	416.67	9.64
December 10, 1995	12.08	416.67	2.52
December 20, 1995	7	416.67	1.46
January 9, 1996	16.58	416.67	3.45
January 21, 1996	7.5	416.67	1.56
January 31, 1996	3.86	416.67	0.80
February 23, 1996	7.4	416.67	1.54
March 21, 1996	.4	173.6	0.03
March 23, 1996	11	416.67	2.29
April 1, 1996	5	416.67	1.04
April 3, 1996	.5	208.34	0.05
April 7, 1996	545	416.67	113.54
May 14, 1996	457.75	416.67	95.37
June 1, 1996	.91	381.9	0.17
June 14, 1996	.3	125	0.02
June 26, 1996	.38	159.7	0.03

COPIRG joined with the Land and Water Fund attorney to investigate a possible suit under the state and federal Clean Air Acts. They also sought out members of the affected community:

<sup>83</sup> State of Colorado Department of Health, Air Pollution Control Division, Emission Permit 91AD180-3 issued to Conoco, Inc. (initial approval).

<sup>84</sup> Jerry Heyd, Refinery Manager to Bob Jorgenson, Colorado Department of Health, Re: Claus Sulfur Recovery Unit NSPS Subpart J Applicability, September 24, 1993.

<sup>85</sup> *Ibid.*

<sup>86</sup> CDPHE estimates can be found in Robert Jorgenson to Dave Ouimette Re: Conoco problems with Sulfur Plants, Inter-Office Communication, October 17, 1996.

<sup>87</sup> Adapted from Randall Weiner to COPIRG Citizen Lobby, Proposed Litigation, October 5, 1997.

We were aware of the concerns going on simultaneously about large numbers of companies operating in that area so we made contact with the director of the CCC and spoke with her about this issue and brought her in to the information that we had access to as well as the president of the local neighborhood association. So we, they had expressed some concern, there was some information in the file about concerns, basically neighbors smelling, I mean the oil refineries aren't particularly sweet smelling to begin with, but the residents were reporting that there were occasionally very nasty smells coming from the neighborhood, and we began to put two and two together that these were probably the occurrences of when there was large-scale venting occurring.<sup>88</sup>

By 1996, residents sensed that certain refinery emissions were increasing substantially from the norm, although they were not aware of the underlying causes:

We didn't know what was going on over there, but we would readily complain because a lot of times when we would see that big flame at night or during the day and at the same time you would start getting the smells from the refinery. And you would smell it heavily in the neighborhood. And so we were complaining about a lot of that stuff at the time just like we had constantly been complaining for years and years and years about the rendering plant. Some days you don't even notice it, but then in the summer times or when the wind's just right it'll gank you, I mean it's a foul, foul smell. It's not unheard of somebody getting a whiff of that and starting to vomit.<sup>89</sup>

As COPIRG, the attorney, and local residents developed an understanding of Conoco's violations, broader regulatory developments began to shape how they would eventually resolve litigation over SO<sub>2</sub> emissions. Federal environmental statutes such as the Clean Air Act contain provisions that allow the EPA to place parts of the programs under state control.<sup>90</sup> This allows the EPA to avoid running programs in all 50 states, a task for which it lacks the necessary resources.<sup>91</sup> In the mid-90's, the Colorado Department of Public Health and Environment worked on meeting EPA delegation requirements, and the federal EPA began to promulgate monitoring, reporting, and enforcement requirements for state implementation (which, in the opinion of COPIRG yielded a more collaborative Notice of Violation policy given the CDPHE's agency culture).<sup>92</sup> By 1998, the state of Colorado was given interim approval for delegation of the EPA's permitting authorities.<sup>93</sup> The issue of delegated environmental enforcement is closely linked to Colorado's comparatively strong self-audit policy enacted by the state legislature in 1997.<sup>94</sup> The self-audit policy in Colorado allows "a privilege for self-critical analysis done in a voluntary self-evaluation of a [company's] environmental compliance."<sup>95</sup> The Colorado state legislature, when enacting this legislation, stated:

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<sup>88</sup> *Supra* note 78.

<sup>89</sup> Interview with Swansea resident, March 8, 2002, in Swansea.

<sup>90</sup> *See* Clean Air Act, 40 C.F.R. Part 70.

<sup>91</sup> Hawks, R. (1998). Environmental self-audit privilege and immunity: Aid to enforcement or polluter protection? *Arizona State Law Journal*, 30: 235; Markell, D. (2000). The role of deterrence-based enforcement in a "reinvented" state/federal relationship: The divide between theory and reality. *Harvard Environmental Law Review*, 24: 1.

<sup>92</sup> 42 U.S.C. § 7661a.

<sup>93</sup> § 25-7-111(2)(c), C.R.S. (1998).

<sup>94</sup> Colo. Rev. Stat. 13-25-126.5(3) (1997).

<sup>95</sup> Formal Opinion of Gale Norton, Colorado Attorney General, No. 98-3 AG Alpha No. HL WQ AGAVQ, December 1, 1998.

The general assembly hereby finds and declares that protection of the environment is enhanced by the public's voluntary compliance with environmental laws and that the public will benefit from incentives to identify and remedy environmental compliance issues. It is further declared that limited expansion of the protection against disclosure will encourage such voluntary compliance and improve environmental quality and that the voluntary provisions of this act will not inhibit the exercise of the regulatory authority of those entrusted with protecting our environment.<sup>96</sup>

Colorado's statutory privilege for environmental self-evaluation was passed in response to a 1993 case involving Coors Brewing Company, which was fined over \$1 million by the Colorado Department of Health after disclosing volatile organic compound emissions.<sup>97</sup> The company was not required to disclose the information, and had learned of the emissions through its own voluntary study. The state statute went beyond mere privilege and relaxed requirements that reporting entities use prompt remediation of any contamination that they discovered. The federal EPA and the Department of Justice have actively opposed the self-audit policy and expressed the opinion that Colorado can no longer meet delegation requirements because of it. One of the mechanisms for the EPA to retain its authority over delegated powers, overfiling, was carried out as part of the EPA's attempt to compensate for the state's lack of sufficient use of its enforcement powers. Overfiling occurs when the EPA begins an enforcement action regarding a program that has been delegated to a state.<sup>98</sup> Residents' concerns over Conoco's sulfur emissions would be resolved in large part through the settlement of an EPA overfiling.

*The Dispute.* Plaintiffs in the Vulcan litigation were able to file suit in a relative vacuum: questions of agency responsibilities for emergency preparedness were being discussed and to some degree resolved in ways that did not impact the litigation or how it was resolved. The citizen suit against Conoco, on the other hand, was shaped in large part by processes beyond plaintiffs' control. Before COPIRG and Swansea residents filed a citizen suit, EPA Region VIII and the CDPHE stepped in, initiating what the former President of COPIRG would refer to as "four games of chess" that were played and solved nearly simultaneously among federal, state, and local interests:

1. EPA Region VIII overfiled on previous CDPHE enforcement actions on March 18, 1997, claiming that in a previous consent order between the state and Conoco the state did not adequately interpret regulations concerning inspections, record-keeping, hazardous waste discharges, notices to the state, and penalties associated with certain counts of RCRA violations;<sup>99</sup>
2. The state filed Compliance Advisories under RCRA and the Colorado Hazardous Waste Act, regarding the presence of benzene in one of Conoco's

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<sup>96</sup> Colo. Rev. State. 13-25-126.5(1) (1997).

<sup>97</sup> \$1.05 Million Fine Against Coors May Deter Corporate Environmental Audits, *Environment Reporter*, 24(13): 570, July 30, 1993.

<sup>98</sup> Zahren, E. (2000). Overfiling under federalism: Federal nipping at state heels to protect the environment. *Emory University School of Law*, 49: 373.

<sup>99</sup> Complaint, Compliance Order, and Notice of Opportunity for Hearing, RCRA (3008) VIII-97-03, in the matter of Conoco, Inc., March 18, 1997.

- wells and the contamination of groundwater.<sup>100</sup> It also continued to work with Conoco on adjustments to its construction permits;
3. COPIRG and local residents filed a citizen's suit under Section 304 of the Clean Air Act, focusing on the fact that Conoco had failed to detect violations for five years as it had not properly monitored its SO<sub>2</sub> emissions;<sup>101</sup> and
  4. Conoco continued to adapt to a series of regulatory and site-specific changes, while working with the CDPHE to ensure that its operations were in line with permit specifications. The company stopped producing leaded gas at its Commerce refinery in 1990, sought, announced, and then scrapped a proposed joint venture with the Colorado Refinery Company to share the costs of complying with more stringent environmental controls (requiring .05% sulfur diesel fuel by October 1993), addressed the reengineering of a device (the grubbs manifold) that caused the death of a worker who was cleaning a reactor in the hydrosulfurization unit, and faced budgetary limits to expenditures for on-site continuous emissions monitoring and sought to improve their control over fugitive emissions, two areas of concern that would be addressed in subsequent consent orders with the Justice Department.

Table 5 (See appendix) illustrates the progression of each of the above legal and organizational developments.

EPA's RCRA overfiling was both a part of its response to the state's audit privilege law and a result of EPA Region VIII's longstanding attempt to work with the state to enforce hazardous waste regulations. The EPA and the state engaged in joint inspections of the refinery in March and April of 1992. The state cited violations found during the inspection in a Compliance Order against Conoco. The Order required compliance within 45 days and required actions similar to what the state had called for in 1985. In December 1995, another inspection took place, unearthing violations that mirrored those found in 1985 and 1992. The Complaint lodged in 1997 amounted to a sprawling list of violations, from faulty recordkeeping to storage and disposal without a permit. The Complaint prompted Conoco to file two motions for accelerated decision, claiming that in their rush to undermine the state's statutory authority the EPA failed to take a proper inventory of Conoco's inspection records.<sup>102</sup>

While the CDPHE was arguably sub-par in its enforcement of certain RCRA violations, it was actively involved in discussing whether the refinery was required to include "routine maintenance" in its APEN emissions estimates. Conoco claimed that process unit turnarounds, which resulted in substantial increases in SO<sub>2</sub> emissions, were not distinct from start-ups, shutdowns, and malfunctions and should not be included.<sup>103</sup>

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<sup>100</sup> Compliance Order on Consent, 98-08-07-02, RCRA (2008)-VIII-98-03, In the matter of Conoco, Inc., August 7, 1998.

<sup>101</sup> Complaint, COPIRG Citizen Lobby, Lorraine Granado, and Michael Maes v. Conoco, Inc., CA 98-30 (N. Co. 1998).

<sup>102</sup> Conoco, Inc.'s First Motion for Accelerated Decision, No. 97-03 In the matter of Conoco, Inc., June 6, 1997; Conoco, Inc.'s Second Motion for Accelerated Decision, No. 97-03 In the matter of Conoco, Inc., June 6, 1997.

<sup>103</sup> Inter-office communication from Robert Jorgenson to Dave Ouimette of CDPHE RE: Conoco problems with the sulfur plants, October 17, 1996; Jay Christopher, Air Program Leader, Conoco to Dave Ouimette, Air Pollution Control Division, CDPHE RE: Conoco Denver refinery, SO<sub>2</sub> issues, March 20, 1997.

In August, 1996, CDPHE requested that Conoco provide the Air Pollution Control Division a record of all incidents where acid gas or sour water stripper offgas was combusted in the main flare since June, 1993. The information was requested in 12 month segments, suggesting the agency was investigating when permitted levels were exceeded.<sup>104</sup> The CDPHE was also actively engaged in a separate RCRA action regarding hazardous substances and waste material found to be migrating from the facility into groundwater and nearby creeks and wells. Compliance Advisories were issued to Conoco in February and August, 1997.<sup>105</sup> Both the EPA Region VIII and CDPHE were in the process of resolving Compliance Advisories with Conoco when citizens filed suit under the Clean Air Act.

The citizen suit was planned well before the two resident-plaintiffs were aware of the legal issues involved, although residents arguably assisted COPIRG and the lead attorney in determining the severity of various malfunctions at the facility. The citizen suit was brought under the Federal Clean Air Act for Conoco's alleged sulfur dioxide emissions.<sup>106</sup> The problem, according to the original complaint, began when Conoco installed a second SRU. The unit malfunctioned on numerous occasions, causing Conoco to perform maintenance while diverting gas to its main flare. In addition to alleged violations of permit emissions requirements, plaintiffs alleged that continuous monitoring and recording of concentrations of sulfur dioxide discharged into the atmosphere was not taking place. Conoco's lack of a continuous monitoring instrument was one of three causes of action for the citizen suit (the final being Conoco's failure to process all gas from the sour water stripper in the SRU). Relief sought included declaratory judgment, a compliance order (that would include monitoring), penalties of \$27,500 per day for each violation under the CAA, and \$100,000 for beneficial mitigation projects. COPIRG asked two of the residents involved in the Vulcan Materials citizen suit to join them as plaintiffs in the case, and the competing focus of the two groups increased the complexity of an already challenging dispute. The community representatives focused on particularized impacts to local residents and the need for monitoring and resident notification, while the state-wide organization sought precedent-setting results at the level of construction permitting. Members of Commerce City neighborhood associations were not asked to involve themselves in the litigation or the mediation process that followed.

*Conoco Adapts.* Conoco sought to adapt to each of the above developments through the efforts of managers, engineers, and environmental professionals.<sup>107</sup> Conoco responded to new corporate objectives, pollution control challenges, or regulatory or permit changes through adjustments in two directions. First, new objectives were tied to specific roles and personnel from upper management through various incentives. Second, middle management used data in what is called the "plant management system" to track emissions points (80-85 in all), respond to "upticks" and regulatory exceedances, carry out trend, incident, and root cause analyses, and propose changes that accounted for

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<sup>104</sup> Jerry Heyd, Refinery Manager to Hugh Davidson, Air Pollution Control Division, Re: Tri-county/APCD Meetings with Conoco on August 13 and August 29, 1996, September 12, 1996.

<sup>105</sup> Compliance Order on Consent Number 98-08-07-02, RCRA (3008)-VIII-98-03, In the matter of Conoco, Inc., August 7, 1998.

<sup>106</sup> *Supra* note 101.

<sup>107</sup> This section was adopted from Interview of Environmental Director, Conoco Refinery, March 7, 2001 in Commerce City and Interview of Air Program Leader, Conoco Refinery, March 22, 2001 via telephone.

budgetary constraints, systems effects, and broader plant optimization goals. The two directions often intersected, particularly within a given refinery's various emissions programs (i.e., Air Program) and broader Environment, Health, and Safety management. These streams of adjustment, adaptation, and innovation were in motion long before the filing of *COPIRG v. Conoco*, and provide valuable information on the feasibility, timing, and potential effectiveness of various options for source reduction.

Since 1990, environmental managers at the refinery had been working on nine environmental initiatives instituted by Conoco upper management, including a pledge to reduce toxic air emissions and hazardous solid waste significantly beyond existing legal requirements. Efforts to adapt to such objectives are limited by whatever information is available and the ability to process and interpret the data. For example, sulfur, which is allowed in finished products in varying (and over time decreasing) amounts, is not uniformly monitored at the refinery, as a patchwork of regulations guide the facility's tracking of various chemicals:

Environmental regulations apply to specific pieces of equipment, so if your piece of equipment is covered by a specific regulation that requires a certain kind of monitoring that's what you do. So, for example, I talked about the heaters and boilers we have, and there's a requirement that the fuel that you burn, if you think of them as big gas stoves almost, not to be too simplified, but if you think about it, we've got dozens of big gas stoves all over the place, we have one monitor that measures the hydrogen sulfide in that gas that goes to every burner, and that's a continuous emission monitor. And we have requirements on the limit of hydrogen sulfide we can have in that monitor, or have in that gas in any period of time. So we get a continuous readout. If the monitor fails for some reason, then we have to take other samples and get other readings so that even if the monitor is not working we have to prove that we stayed in compliance. And then we have a continuous emission monitor, when I mentioned earlier all of the changes we had to make in the early 1990's to get the sulfur out, we put in a process that helps us process the sulfur, and it has a continuous emission monitor for our sulfur dioxide concentration in that. The rest of our facility now, because we haven't made the kind of changes that require the emissions monitors, we use what are called AP-42 factors. The EPA has said if you process this much crude oil through a certain kind of unit, this is the factor you use to estimate your emissions<sup>108</sup>

It depends on the units involved. There's multiple places where we have sulfur dioxide emissions. There's one that has a continuous monitor on it. There's one that's not yet been required. We have two sulfur recovery units. One of those is continuously monitored right now. The other one which is an older one had not triggered the requirement to do so, but under the national consent decrees [lodged after the settlement of *COPIRG v. Conoco*] will. And it will have a continuous monitor on that. And there are other sulfur dioxide sources in the plant as well. And some are monitored more frequently, some less, a lot of that dependent on regulatory requirements<sup>109</sup>

Monitoring other sources of environmental contamination, such as particulate matter and fugitive emissions and flaring, poses completely different sets of challenges. For each of these areas of emissions, environmental managers work in teams (such as the Reliability Group and the Refinery Leadership Team) to (a) stay within permit requirements, (b) avoid upsets and reduce the unplanned release of certain chemicals, and (c) increase plant efficiency. Given the fact that the refinery process is continuous throughout the year, crude oil and its various toxicants and impurities are flowing through the system every hour of every day. Uncontrolled or unplanned releases, resulting because of electrical or

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<sup>108</sup> *Supra* note 107 (Environmental Director)

<sup>109</sup> *Supra* note 107 (Air Program Manager)

system component failure, can account for a significant percentage of overall emissions. An upset that lasts 10-20 minutes, where certain streams are sent to a flare to avoid overpressuring vessels or spilling hazardous chemicals, can yield more emissions than normal operations for 1-2 days. Routine maintenance factors strongly in attempts to achieve reliability and emissions reductions. A weekly incident review process involves a formal management review of incidents and in the case of large-scale incidents a root cause failure analyses. Under the recent consent decree between Conoco and the Department of Justice, the facility must comply with strict guidelines for when to trigger a root cause failure analysis (for example, releases of more than 500 lbs./day of sulfur dioxide).<sup>110</sup>

Communicating what is learned through failure analysis, and assigning new roles or incentives to engineering groups, operators (who work on four separate shifts under contract), mechanical personnel, and planners who determine how the facility should be run is a challenging task. Equally daunting is the need to target cost-effectiveness across the universe of a facility's boilers, valves, pumps, flanges, and other pieces of equipment, estimate the effects of any changes on the system as a whole, and propose changes that will remain within projected budget allocations or convince upper management of their need.

The process engineers are kind of the ones sitting out there saying how can I run this unit better? What can we do that can create an advantage for us someplace? And so they're by nature looking out ahead and I think that's the guys who can do that. And the other one here probably who has a really good long-term and kind of how does it all fit together is the optimization leader... The barrier is getting projects to be viewed as cost-effective and that might not be at the site level, it may be at a higher level than that. I mean there's people look at a project, and as a company you've gotta make money. And so that ultimately sits out there behind things, and people have always struggled with the concept of does an environmental project make money and I actually think that there's more acceptance now that they do. But the payback's different than what the people are normally used to looking for. It might be indirect. Traditionally, from an engineering perspective, people would look at a project and they'd say if we do this then we can produce x amount more gasoline and that means we make that much money, so you compare that to the original cost of the project and you can say yeah, this is justified. And the environmental projects don't have the same direct payback to them. Sometimes they are cost-avoidance: if you do this you won't get a penalty. Sometimes, and then there's the grey, it's really hard to quantify community acceptance.<sup>111</sup>

The challenges of cost-effectiveness, mining and interpreting thousands of data points, coordinating among diverse work groups, operators, engineers, and upper management, and communicating new goals and tasks to over 200 employees on-site are indeed daunting. At the same time, they offer opportunities for those seeking to enforce the permits and regulations that drive much of the refinery's environmental management work. Indeed, the fact that citizen concerns over SO<sub>2</sub> emissions could be resolved by finding a practical or engineering solution rather than a legal finding of fact encouraged settlement discussions in the first place. But once discussions commenced around Conoco's proposed solutions to SO<sub>2</sub> emissions, there is little evidence that the mediation process offered a full appreciation of how plaintiffs could shape discussions around

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<sup>110</sup> Notice of Lodging of Consent Decree under the Clean Air Act, Federal Register, 67(17): 3735 (January 25, 2002).

<sup>111</sup> *Supra* note 107 (Air Program Director).

Conoco's *broad* attempts to address sulfur emissions in order to address the company's environmental management challenges. Nor was it clear that EPA Region VIII, the Justice Department (involved in settlement negotiations with a significant percentage of the nation's refinery operations at the time), or plaintiffs had figured out an appropriate division of labor to maximize Conoco's promised reductions in emissions more broadly. Lacking broader coordination among these groups, Conoco developed a response to EPA's RCRA action that served as the primary driver behind the mediated resolution of the citizen suit.

*Elements of Dispute Resolution Process.* As indicated in Table 2, the citizen suit was filed after the RCRA actions were commenced by EPA Region VIII and CDPHE. Plaintiffs gave notice of violations in the citizen suit on November 3, 1997.<sup>112</sup> EPA Region VIII and Conoco had been engaged in an alternative dispute resolution process facilitated by an administrative law judge since June 30<sup>th</sup> 1997.<sup>113</sup> By September 2<sup>nd</sup>, the parties to the EPA RCRA action reportedly had "developed some reasonable possibilities for settlement that remain to be explored."<sup>114</sup> The parties' tone changed a month later, when they recommended termination of the ADR process.<sup>115</sup> Two weeks after plaintiffs in *COPIRG et al. v. Conoco* gave notice of their intent to sue, Region VIII and Conoco made a joint request for a stay of litigation.<sup>116</sup> Parties believe that it is at this point that Conoco began to contemplate and design a settlement that would satisfy the demands of Region VIII, COPIRG, residents, and the CDPHE as expressed in the RCRA action, the citizen suit, and state activities such as discussions over permitting of the #2 SRU (see Table 2). Court records confirm that two months after a stay was granted for the RCRA matter, parties began to reach a "settlement in principle" that included a supplemental environmental project (SEP), the magnitude of which "may impact other issues currently being discussed by the parties outside the context of this matter."<sup>117</sup> Less than a month following the RCRA "settlement in principle," parties to *COPIRG v. Conoco* began to meet under the direction of a mediator to consider the "Conoco Denver Refinery Sulfur Project Presentation."<sup>118</sup> Importantly, parties to the EPA RCRA action had to request motions for extension of time, and were given several deadlines for submitting an executed Consent Agreement to the court.<sup>119</sup> Parties to the citizen suit, particularly resident-plaintiffs, thus entered settlement negotiations *after* Conoco had begun to try to link settlements in the two cases and the court had set tight deadlines relevant to such linkage. Conoco would ultimately resolve the above two actions as well as CDPHE's

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<sup>112</sup> Notice of Intent to File Suit, *COPIRG Citizen Lobby, Lorraine Granado, and Michael Maes v. Conoco, Inc.*, CA 98-03 (No. Co 1997)

<sup>113</sup> Notice from ADR Judge, RCRA (3008) VIII-97-03, In the matter of Conoco, Inc., July 2, 1997.

<sup>114</sup> sept 2 - reasonable

<sup>115</sup> Report Recommending Termination of ADR Process, RCRA (3008) VIII-97-03, In the matter of Conoco, Inc., October 1, 1997.

<sup>116</sup> Joint Request for Stay of Litigation, RCRA (3008) VIII-97-03, In the matter of Conoco, Inc., November 18, 1997.

<sup>117</sup> Complainant's Status Report and Request for an Extension of Time, RCRA (3008) VIII-97-03, In the matter of Conoco, Inc., January 22, 1998.

<sup>118</sup> Meeting Notice, Conoco Denver Refinery Sulfur Project Presentation, February 17, 1998, 9:00 a.m.

<sup>119</sup> Orders Granting Extension, RCRA (3008) VIII-97-03, In the matter of Conoco, Inc.: April 15, 1997, June 19, 1997, January 22, 1998, and March 17, 1998.

RCRA action over groundwater contamination with essentially the same Supplemental Environmental Project.

Pre-mediation. The district court hearing *COPIRG v. Conoco* tried to order the parties to attempt settlement negotiations in January, 1998 (the judge ordered the scheduling of a settlement conference to be presided over by a magistrate judge in early February). Parties did not seem particularly interested in following the judge's timeline (they filed a joint motion to vacate the judge's scheduling orders), and instead continued discussions with a mediator whom they had selected jointly (although residents did not have any input to this process).<sup>120</sup> Conoco had already begun to focus on an overarching settlement to cover the citizen suit and RCRA action. Plaintiffs to the citizen suit, on the other hand, approached negotiations with conflicting interests. While plaintiffs eventually coalesced around seeking refinery process changes, the residents entered the mediation phase in order to gain *assurances* of reduced flaring and emissions, *understanding* of the risks associated with sulfur dioxide and other chemicals released, and the ability to *educate* other residents of impacted communities of the risks posed by the facility. Compare this with COPIRG's interests in source reduction as well as setting precedent around specific permitting and broader regulatory concerns:

We came in with an agenda that we had, that we are the victims of what's going on over here and it needs to be fixed not because of your profits or not because of anything else but that we're overburdened, and that's been our story over here is that we are the center of everything and we're overburdened by everything from all across the city. People drive into the city to work, we get the fumes from their cars. They need more highways, they come right through our neighborhood. The trains, people want to move downtown, they need a place to switch the trains and store the trains, we get them in our backyard. I think COPIRG stuck pretty much to their stuff and we jumped on them for things that we needed. We needed the assurance that the flare-ups wouldn't keep going up, we wanted an understanding of what was being released in all of those releases, we wanted an understanding of what the health effects would be from the things that we were breathing from that area, and that just the assurances that those would be reduced or stopped.<sup>121</sup>

We were trying to get to the "bubble," and that is tell us your total emissions as the plan and now let's talk about what strategies would it take for you to actually prevent the pollution in the first place. And we started inquiring about changes in the production process. So I think the fact that we brought a source reduction, pollution prevention orientation was very important to negotiations. Institutionally both ourselves and I think the community groups had an interest in saying, we would like to see how you could reduce emissions.<sup>122</sup>

One of the mediator's tasks was to justify representation of all interests that could either influence or be affected by the outcome of any settlement of *COPIRG v. Conoco*. Assuming the alleged violations were true, the mediator assessed whether plaintiffs' interests, if obtained, would benefit "others that were similarly situated" or part of the same class.<sup>123</sup> Because the mediator could not identify any proposed solutions to sulfur emissions that could prove detrimental of the broader community if implemented, he chose not to broaden the mediated discussions beyond the parties to the suit. The

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<sup>120</sup> Joint Motion to Vacate Scheduling Orders, *COPIRG Citizen Lobby, Loraine Granado, and Michael Maes v. Conoco, Inc.*, CA 98-N-30 (N. Co 1998).

<sup>121</sup> *Supra* note 89.

<sup>122</sup> *Supra* note 78.

<sup>123</sup> Interview of Mediator, April 4, 2002 via telephone.

mediator was responsible for trying to align the interests of the plaintiffs, whose interests did not entirely overlap as they commenced discussions with a company that was already in the process of justifying proposed process changes to the EPA Region VIII. Table 6 provides the premediation elements of *COPIRG v. Conoco*.

Table 6. *COPIRG v. Conoco* Mediation Elements: Pre-Mediation.

Element	Residents	COPIRG	Conoco	Mediator
Initiation	Informed of discussions between COPIRG and Conoco that had led to desire to reach settlement	Agreed to attempt to reach settlement	Agreed to attempt to reach settlement	Contacted by counsel for plaintiffs and senior counsel for Conoco
Assessment	Limited; approached the mediation prepared to learn about sulfur recovery and flaring operations	Extensive research of Conoco's emissions; comparative knowledge of emissions for Denver area, region; contacted petrochemical operations expert in CA	Series of discussions with EPA Region VIII regarding settlement of RCRA action; internal consideration of process changes necessary to meet projected regulatory changes; formulation of Sulfur Project Presentation	Discussions with parties; discuss and agree to responsibilities of parties to mediation; interviews to discern consistency of issues and appropriateness for mediation discussion; assessed willingness to reach agreement
Representation	President of CCC; President of United Swansea (counsel – same as COPIRG)	Colorado Public Interest Research Group President, counsel	Plant manager; senior counsel, and environmental manager	Environmental attorney hired jointly by parties
Rationale for Representation	Experience with mediation; substantial knowledge of environmental concerns of neighboring communities	History of advocacy for clean air legislation; involved in passage of CO CAA and proponent of the APEN system; represented statewide and air basin interests	Persons with greatest knowledge of plant operations and challenges, including sulfur recovery; experienced counsel with knowledge of RCRA action with EPA Region VIII	Experience working with Conoco and Land and Water Fund; knowledge of both sides' concerns; extensive experience mediating environmental disputes and understanding of legal issues

Element	Residents	COPIRG	Conoco	Mediator
Objectives	Convince Conoco to make necessary changes to reduce their sulfur dioxide	Focus attention on serious environmental concern; take away	First phase of meetings: demonstrate that Conoco is operating	Help parties reach settlement that addresses their underlying interests

	emissions; wanted to improve Conoco's practices, not their image; wanted assurance that flare-ups wouldn't continue; understanding of what was being released; build relationships; pursue monitoring technologies for advanced warning of releases; set precedent for other community-corporate relations	economic incentive for Conoco to violate the laws in question; include a financial component that would go toward broader environmental benefits; settlement goes to a third party (not spent by the company or COPIRG); set precedent for other statewide litigation	within parameters of relevant permits  Second phase: determine how interests of plaintiffs could be build into a settlement that also addresses the RCRA action; work with community on an environmental project; develop more productive relations; improve efficiency/legitimacy of refinery operations; be viewed as a good citizen	
Groundrules	<ol style="list-style-type: none"> <li>1. Neutral must maintain impartiality toward all parties</li> <li>2. Neutral has the obligation to assure that all parties understand the nature of the process, procedures, role of the neutral, and the parties' relationship to the neutral</li> <li>3. Neutral must refrain from entering or continuing any dispute if he believes that participation would be a conflict of interest</li> <li>4. Confidentiality must be respected and maintained where appropriate</li> <li>5. Neutral will exert every responsible effort to expedite the process</li> <li>6. Neutral has no vested interest in the settlement, but must be satisfied that the agreement will not impugn the integrity of the process</li> <li>7. Statements and representations will not be later used by one party against another in litigation</li> </ol>			

Mediation. The mediation commenced with a meeting at the refinery where parties considered a presentation of Conoco's proposed sulfur project. In addition to proposed structural changes, the presentation included a "Pollution Prevention Progress Report" outlining the refinery's goals for emissions reductions: 5% per year for TRI, criteria air (including sulfur), and hazardous waste emissions, using 1993 as a base year. Also listed as facility-wide goals were the improvement of energy utilization and reliability, documentation of operating standards, enhanced environmental training for all employees, clear roles and accountability for employees, and improved emergency preparedness.

Formally, the mediation began less than a month later (March 10, 1998), at a preliminary meeting where parties discussed (a) an agenda, (b) the objectives of the mediation, (c) groundrules for the process, (d) a timeframe for completion, and (e) the factual background of the controversy.<sup>124</sup> The scope of settlement discussions was limited to the factual background and violations alleged, actions that Conoco could take to resolve the alleged violations, and the drafting of a settlement that would codify actions required of Conoco and the plaintiffs for resolving the issues at hand.<sup>125</sup> The

<sup>124</sup> Draft Settlement Discussions between COPIRG and Conoco, March 10, 1998, 9:00 a.m. to 12:00 noon, Suggested Meeting Agenda.

<sup>125</sup> Draft Settlement Discussions between COPIRG and Conoco, March 10, 1998, 9:00 a.m. to 12:00 noon, Responsibilities of the Parties.

timeframe, established during the next meeting, was surprisingly short (3-4 meetings over a span of weeks) for discussion of refinery process changes and broad community- and state-wide concerns. Within the context of the “four games of chess,” it is possible to see why the timeframe had to be condensed.

Mediation progressed through a combination of shuttle diplomacy and face-to-face meetings between the parties, including COPIRG, resident-plaintiffs, plaintiffs’ counsel, the refinery’s plant and environmental managers, senior counsel, and other attorneys (some outside counsel). An additional party, a scientist with experience in refinery emissions who worked for an environmental organization in California, joined via telephone for at least one meeting. Her role was to ensure that proposed alternatives were feasible and would meet plaintiffs’ objective of reducing sulfur emissions. Plaintiffs understood that there were probably problems at the facility beyond the matter of the sulfur recovery units, but lacked the sophistication to pursue them. Plaintiffs’ attorney admits that the case lacked the *value* necessary for bringing in more experts to consider other options (value in terms of the potential for success at trial). Nonetheless, their hired expert was adept at evaluating Conoco and offered a buffer for the plaintiffs as they discussed refinery operations under conditions of uneven information.

The first meeting after preliminary discussions took place in the mediator’s offices on March 31<sup>st</sup>.<sup>126</sup> The meeting’s agenda, drafted by the mediator, included (a) a presentation by Conoco, (b) a discussion of a proposed SEP, (c) summary of the preliminary meeting, (d) possible approaches to the EPA, (e) steps to address the court’s schedule, and (f) scheduling issues.<sup>127</sup> Conoco’s environmental manager began the session with a presentation of the refinery’s efforts to reduce sulfur emissions, using an aerial photograph of the refinery as a backdrop. Sources of sulfur dioxide and sour water, fate and transport, historic emissions, odor dynamics, and other aspects of the broader problem were presented. The mediator, an experienced environmental attorney, modeled the discussions after the National Environmental Policy Act’s scoping process, where project alternatives are scoped and then compared in terms of their environmental and economic impact. Plaintiffs relied almost entirely on Conoco’s information, much of which had been promised at the preliminary meeting and shared at the first session, in order to evaluate Conoco’s proposals. Information sharing was followed by a discussion of whether the settlement discussions could result in a SEP that would resolve EPA Region VIII’s RCRA action. There were concerns that such an arrangement wouldn’t work, that plaintiffs would still require a consent order for any settlement with them, that an EPA global settlement with Conoco refineries could negate elements of the SEP that parties were working toward, and that EPA would require a permit modification that could delay resolution of the citizen suit because it would require extensive emissions modeling and public comment. Parties agreed to work toward an interim agreement during the next meeting and to put aside these broader issues. Conoco’s involvement with EPA in active litigation restricted their ability to collect additional information requested by plaintiffs for the next meeting (such as an inventory of sulfur and other compounds emitted by the facility).

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<sup>126</sup> Minutes of Settlement Discussions, March 31, 1998, between COPIRG and Conoco.

<sup>127</sup> Settlement Discussions Between COPIRG and Conoco, March 30, 1998, 9:00 a.m. to 12:00 noon, Meeting Agenda.

Between the first and second meetings, plaintiffs met with the mediator to discuss desired components of an interim agreement.<sup>128</sup> Here, the community's sense of what an agreement should include was made clear. It is instructive to compare these elements with an interim agreement that was developed at the next mediation session, held on April 20<sup>th</sup>:

Table 7. Comparison of Plaintiffs' Desired and Actual Components of Interim Agreement.

Plaintiffs' Elements (April 7, 1998)	Interim Agreement Elements (April 20, 1998)
Conoco to provide SO2 inventory for the refinery	NOT INCLUDED
Conoco to provide \$5,000 to COPIRG to hire a technical consultant to participate in development of a SEP; consultant would:	NOT INCLUDED
<ul style="list-style-type: none"> <li>a. Conduct a literature review of technology options for SRU upgrades</li> <li>b. Evaluate the engineering work performed by Conoco concerning the preferred option for an SRU upgrade</li> </ul>	
Conoco to support a community educational program for the Swansea, Elyria, and Globeville neighborhoods that would be conducted over one year and include:	Conoco to specify the anticipated design and development schedule for any engineering studies or other efforts underway or planned to reduce emissions related to this action at the refinery (adherence to this schedule will not be subject of a breach claim)
<ul style="list-style-type: none"> <li>a. Information and briefing concerning efforts to minimize or eliminate to the extent possible odor sources in the area</li> <li>b. A one-time performance of a simple air quality dispersion model to illustrate how emissions are dispersed under different meteorological conditions</li> <li>c. A briefing about on-site monitoring that is performed by Conoco to protect employees and the possibility of fenceline monitoring to protect the community</li> </ul>	Conoco to keep plaintiffs informed on a regular basis of efforts or development work to reduce emissions related to this action through an information exchange process designed and facilitated by the mediator
	Conoco to provide all relevant information regarding current or planned efforts to reduce emissions related to this action as soon as practicable after information is available or after submission of such to EPA or the State of Colorado
	Conoco to fund a Community Right-to-Know project in a lump sum of \$72,000. Project designed to collect information about emissions in the community and to evaluate options to reduce such emissions. May include air quality modeling, monitoring, and technical assessments by consultants hired by plaintiffs. Plaintiffs to use scientifically recognized methods and protocols to ensure accurate information. Agree not to use funds for adversarial proceedings or for directly targeting Conoco's facilities
Plaintiffs' Elements (April 7, 1998)	Interim Agreement Elements (April 20, 1998)
Conoco to invite the Swansea, Elyria, and Globeville communities to participate as a member of the Industrial Council	SAME, with option for parties to determine that a different or new forum would be more appropriate than the Council

<sup>128</sup> Meeting with Randy Weiner, Michael Mae, Lorraine Granado on April 7, 1998.

Conoco to establish a performance measure (reduction of SO <sub>2</sub> emissions by a certain tonnage per year) for the SEP as determined by the evaluation process	Parties agree that the Agreement is directed toward significantly reducing emissions in the community including SO <sub>2</sub> and other pollutants that cause odors
	Conoco to withdraw request to State for modification of existing permit related to turnaround emissions
	Any press releases or public information related to this action shall be jointly issued
	Plaintiff agrees not to encourage the EPA or State of CO to prosecute a civil action in court related to the subject matter of this action
	Plaintiff agrees not to review automatic disclosure materials until May 4, 1998
Plaintiff to dismiss civil action without prejudice	SAME, although a Second Settlement Agreement to be executed by Conoco would require dismissal <i>with</i> prejudice
Conoco to pay plaintiff's costs and attorney's fees	SAME, with amount stipulated

The above interim agreement accomplished several things: it maintained a certain level of ambiguity around the process and extent of sulfur dioxide emissions reductions, it transferred some of the monitoring, modeling, and emissions investigatory work from the company to the plaintiffs, and it included stipulations that served to shield the company from further liability. It also de-linked the establishment of a performance measure (SO<sub>2</sub> emissions reductions) from any community-driven evaluation process, for which plaintiffs had advocated. Thus, the interim agreement gave Conoco a level of flexibility that was necessary to pursue negotiations with EPA Region VIII, which by this time began to focus on an SO<sub>2</sub> emissions reduction SEP.

As with the Vulcan mediation, it was challenging for the parties to reach a point where they could engage in creative problem solving. As the interim agreement suggests, progress in this regard was slow at first. At some point, either at the second meeting or at future sessions designed to finalize settlement documents, the parties began to focus on some of the specific elements of the production process. Plaintiffs credit the plant manager for showing a level of patience in explaining how production was related to sulfur emissions. While Conoco's attorneys sought to limit his sharing of information, plaintiffs were given an opportunity to evaluate what they were being shown:

Then we were really clear that they needed to replace sour water stripper number one. It was ancient, it was frequently down, it wasn't able to process as much as the second one. And so what had happened is since this area was declared an economic enterprise zone, then well you know all the tax breaks and stuff, so Conoco had literally quadrupled in size. But it had not necessarily kept up making the changes to deal with the additional production. And so the sour water stripper was older than heck. They had to put in one new sour water stripper that was unit number two but unit number one had never been replace so how they were dealing with that was just flaring, just burning it off. So we were really clear that the response had to be that they had to replace this.<sup>129</sup>

They were so busy selling us on their preferred solution that it seemed that we were getting really good answers to our questions. And ultimately I think Conoco did a very good job of killing three

<sup>129</sup> Interview of Swansea Resident, March 5, 2002 in Denver.

birds with one stone. And I think we went along with it in part because I recommended that we not continue with strong litigation with the judge that we got and because they did provide us with some things. And we did get a green light from the San Francisco folks that ultimately this is what a refinery ought to do in a situation like this. So, that's when you settle.<sup>130</sup>

Plaintiffs characterize the mediation as a relatively straightforward process that lacked the “human element” of the Vulcan process. It is also made clear that the process *overall* seemed driven by Conoco as well as forces beyond the scope of the mediation. Information flowed primarily in one direction: from Conoco to plaintiffs, who felt as though Conoco was “selling” a preferred option from the outset. Even the first official proposal for a community-driven SEP was made by Conoco. The effect of this arrangement was to give residents a sense that “there wasn’t much to discuss,” which discouraged attempts to reconfigure the process around their objectives (i.e., monitoring, modeling, community awareness, informed, community-driven process of selecting engineering alternatives):

I think we let them off the hook too easily. And I think the things that they planned on doing were OK, but we really didn’t get anything that we were looking for as far as the community goes. We did want some type of air monitoring, we did want some type of notification system in case there was a bad flare-up so that people with allergies could stay in the house or lock themselves off. We wanted some of those kinds of things that we probably could have forced on them. Small things, but things that would really make the community feel a little bit more protective of their health. [We didn’t pursue these because] I think that there were so many different people involved in the process, they were so willing to give up what they were giving up, and they were really pushing on a timeline and trying, there was already a suit filed I think and they had so much time to come up with a solution.<sup>131</sup>

As parties moved toward detailing the final settlement documents, the two most important questions for the residents remained: How did Conoco’s sulfur emissions problems affect the surrounding area and What level of emissions reductions would amount to a noticeable improvement in odor abatement and human health more generally? Residents’ notions of how these could be answered were de-linked from Conoco’s decision-making processes (both internal and with regard to the RCRA actions), meaning residents had to rely in large part on the expertise and leverage of the environmental agencies to ensure that these were properly addressed.

The Agreement. The final agreement between plaintiffs and Conoco was signed on April 29<sup>th</sup>, 1999, nearly a year after plaintiffs filed a Notice of Dismissal dismissing the citizen suit without prejudice.<sup>132</sup> Parties reached an Agreement Regarding Notice of Dismissal on May 4<sup>th</sup>, 1998, which would guide development of the final Agreement. Table 8 details elements of each document:

Table 8. *COPIRG v. Conoco* Settlement Elements.

Notice of Dismissal Agreement	Settlement Agreement
Plaintiff agrees to file notice of dismissal	Plaintiffs will designate a payee and account to receive funds, to which Conoco will pay a lump sum of \$72,000

<sup>130</sup> *Supra* note 81.

<sup>131</sup> *Supra* note 89.

<sup>132</sup> Settlement Agreement and Release between COPIRG Citizen Lobby, Michael Maes, Lorraine Granado, and Conoco, Inc., April 29, 1999.

Conoco to sign Settlement Agreement, which will become fully effective on or before May 4, 1999	The Community Right-to-Know Project is designed to collect and disseminate information about emissions in the community and to evaluate options to reduce such emissions.
Conoco to use its best efforts to secure participation of a representative of the Globeville, Swansea, or Elyria communities in the Industrial Council (best efforts commitment not subject to breach claim)	Conoco to withdraw its December 30, 1997 request to the state that the state modify Conoco's Permit #91AD180-3 to include turnaround emissions
Conoco and EPA are contemplating entering into an agreement regarding a sulfur dioxide SEP, which will identify several technical options, each of which will result in SO <sub>2</sub> reductions from the refinery. The evaluation process will be completed within three months of the signing of any consent agreement with EPA. Should EPA and Conoco enter into a consent agreement, Conoco will:	Parties agree and assume the risk that if facts with respect to the matters covered in the Agreement are found hereafter to be other than or different from the facts now believed or assumed to be true by either or all parties, that this Agreement shall nonetheless remain in full force and effect and fully effective
<ul style="list-style-type: none"> <li>a. Provide plaintiffs with copies of the SEP design and development schedule within two weeks of signing the consent agreement</li> <li>b. For twelve months, beginning on April 27, 1998, Conoco will inform plaintiffs of SEP progress, providing all information regarding the SEP (including all information received from EPA) as soon as practicable</li> <li>c. Conoco is not required to disclose to plaintiffs any information that would be "confidential business information" under state or federal law</li> </ul>	Plaintiffs discharge Conoco from all liability, rights, claims, costs, expenses, actions, causes of action, suits of liability and controversies of every kind concerning the claims and incidents which were raised in Civil Action No. 98-N-30
Conoco to pay Plaintiffs their costs, expert witness fees, and attorney's fees associated with this action (\$23,000)	Agreement shall not be construed as an admission by any party
Agreement shall not affect parties' rights if litigation is refilled; if an action reasserting the claims in this case is filed, parties agree that all defenses and arguments will be argued as if this case had been stayed rather than dismissed	All press releases will be jointly issued
Agreement shall be binding upon and inure to the benefit of the parties, their heirs, executors, administrators, successors, and all persons now or hereafter holding or having all or any part of the interest of a party to this agreement	Parties have not assigned or transferred or subrogated any interest in any claims related to the subject matter of the Agreement
Agreement supercedes all prior and contemporaneous negotiations, agreements, representations, and understandings of parties	Persons represent that they are fully authorized to execute and deliver the agreement on behalf of each party; agreement is binding, constitutes the entire agreement, can not be supplemented unless in writing by each of the parties, shall be governed by the laws of the state, and may be executed in any number of counterpart originals.
If any provision is held to be invalid or unenforceable, such holding will render this Agreement invalid unless provisions are severable and if severance is equitable to the parties	

Sulfur dioxide emissions had already been addressed through a Consent Agreement approved under EPA Region VIII's RCRA action as well as a Compliance Order issued by the EPA and CDPHE regarding separate RCRA and Colorado Hazardous Waste Act violations.<sup>133</sup> Terms of settlement for the RCRA actions included a SEP in the

<sup>133</sup> Consent Order, RCRA (3008) VIII-97-03 in the matter of Conoco, Inc., August 11, 1998; Compliance Order on Consent, RCRA (3008) VIII-98-03 in the matter of Conoco, Inc., August 7, 1998.

amount of \$337,500 plus \$627,500 in addition to mitigated civil penalties.<sup>134</sup> A SEP, the purpose of which was to reduce sulfur emissions by 200 tons per year, was designed to proceed according to an engineering assessment of three options, detailed by the EPA, for structural changes at the facility to address sour water stripper gas emissions. Plaintiffs in *COPIRG v. Conoco* were kept abreast of developments through periodic reports that included activities accomplished, problems and solutions, any sampling activities, personnel or schedule changes, activities planned, and estimated costs for activities planned. A deadline of October 1, 2000 was set for completion of construction, testing, and implementation of the engineering alternative selected. A representative of the Cross Community Coalition attended further meetings with refinery staff and three community involvement groups in order to help the residents oversee the implementation of sulfur dioxide emissions reductions while planning an appropriate Community Right-to-Know project. The SEP proceeding on-schedule, leading to improvements to the #1 SRU and its associated tail gas incinerator and allowing sour water stripper overhead gas to be proceeded in the #1 SRU.<sup>135</sup> Conoco's completion of the SEP was conditioned in part on its agreement to modify its air emissions permits for its #1 and #2 SRU's to indicate that (a) all sour water stripper overhead gas would be processed in the two units, (b) no sour water stripper gas would be flared unless both SRU's were incapacitated unless there is an emergency situation, and (c) SRU emissions would be monitored and records maintained.<sup>136</sup> The refinery's startup, shut down, and malfunction emissions fell from an average of 322 tons per year (1994-1998) to 18.4 tons in 2000.<sup>137</sup> Conoco's overall expenditures for the construction phase of the project totaled over \$2 million.<sup>138</sup>

Residents, having achieved their objectives of ensuring substantial reductions in sulfur emissions as well as permit modification that restricted the kind of flaring operations that led to citizen complaints, were left to decide how best to apply their settlement dollars under the Right-to-Know Project.<sup>139</sup> The settlement dollars were spent through the Colorado People's Environmental and Economic Network (COPEEN), an organizing and environmental advocacy group operating under the CCC organization.<sup>140</sup>

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<sup>134</sup> *Ibid.*

<sup>135</sup> See Quarterly Status Reports, Docket Numbers RCRA (3008) VIII-97-03 and RCRA (3008) VIII-98-03, Conoco Sulfur Dioxide Emissions Reduction Project.

<sup>136</sup> Brenda Morris, Legal Enforcement Program, US EPA Region VIII to Thomas Meyers, Environmental Director, Conoco, Inc., March 17, 1999.

<sup>137</sup> Brian Lever, Refinery Leader, to John Works, Technical Enforcement Program, EPA Region VIII, Re: Sulfur Reductions SEP Completion Report, Docket Numbers RCRA (3008) VIII-97-03 and RCRA (3008) VIII-98-03, June 29, 2001

<sup>138</sup> *Ibid.*

<sup>139</sup> In addition to carrying out the Right-to-Know project, residents had to determine whether involvement in one or more of the existing community involvement forums would be worthwhile. The Settlement Agreement required the parties to seek inclusion of a Swansea-Elyria-Globeville representative on the Industrial Council, which was formed in 1993 by Conoco to address odor complaints originally made by Commerce City residents. The Council was responsible for setting up meteorological stations around the area and link them to the existing complaint response system. The network gave Conoco and other businesses the ability to identify where the source of a complaint may have originated. Residents did appoint a representative for the Council, but were dissatisfied with the format of the meetings as well as the lack of authority for those not on the executive committee. *Supra* note 108 (Environmental Director); *Supra* note 129; Memorandum to Randy Weiner et al. from Glen R. Smith, Re: Update/Conoco/Citizen Involvement Forums, September 8, 1998.

<sup>140</sup> Interview with COPEEN coordinator, March 4, 2002 in Swansea.

A substantial portion of the settlement was used to research the Toxics Release Inventory and Environmental Defense's "Scorecard" website. The goal of this project was to "develop accurate and thorough information around who the major polluters are in the area, what sort of toxics they emit and the possible detrimental health effects of those pollutants."<sup>141</sup> COPEEN developed a better understanding of the cumulative impacts of pollution to Northeast Denver, and worked with the 80216 Regional Geographic Initiative (the zip code has the highest emissions levels in the state of Colorado) to disseminate educational materials regarding how to prevent everyday exposures to toxic pollutants.<sup>142</sup> COPEEN discovered through its research, which was assisted in part by a public relations representative of Conoco, that much of the emissions in the 80216 zip code did not come from large point sources:

We learned from TRI data that there 2 million pounds a year of legal hazardous emissions into the air, water, and soil. However, we found out that it's really the smaller emitters that emit more than that. Because the three major emitters are classes of businesses. It's autobody paint shops, printers, and wood treatment plants. You know we have so many of those that put together, those plus other small businesses actually emit more than the 2 million pounds but they're not required to report to TRI. So we did that and [the Conoco representative] was very instrumental. In fact, he used our money to have Tetra Tech do some GIS mapping for us.<sup>143</sup>

COPEEN began planning a regional initiative to help small businesses improve their pollution prevention practices in 2000.

*Discussion.* Much of the residents' concerns regarding air emissions were indeed resolved by the convergence of the citizen suit and EPA and CDPHE RCRA actions. Sulfur dioxide emissions originating from malfunctions and maintenance were reduced dramatically, while permit modifications called for an end to the flaring practices that led to citizen complaints. At the same time, the division of labor with regards to generating and exploring options for improving refinery operations and meeting residents' interests *beyond sulfur emissions* left considerable room for improvement. To understand why, we have to return to the mediation space itself. The meetings between parties to the citizen suit were short, limited by the agenda to an exploration of solutions to a highly specified and technical problem, and bound by time limits imposed by external processes. In addition, plaintiffs did not have the momentum and strength of a ruling such as the order granting standing to sue in the Vulcan case. More important than the parties' alternative to negotiated settlement, however, was the manner in which the parties' alternatives to a negotiated agreement *changed*, at times without even their awareness, as Conoco adapted and linked the citizen suit to other actions.

It would be unfair to claim that the residents in the Conoco civil suit lacked a vision for achieving their communities' objectives. To the contrary, the residents' proposals that were communicated to the mediator show a level of subtlety and sophistication that one would expect from a group that had built a community visioning process into an EPCRA settlement months prior. In the end, residents' desires to involve the community in generating engineering options and encouraging Conoco to carry out

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<sup>141</sup> COPEEN Annual Report, Year 2000.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Supra* note 129.

modeling and an exploration of fenceline and other monitoring technologies were ignored. Conoco had already determined, through work predominantly with EPA Region VIII, an acceptable range of engineering options to consider through implementation of a SEP. The alignment of two RCRA actions allowed Conoco to suggest that adjudication of *COPIRG v. Conoco* would recommence should plaintiffs in the citizen suit fail to take advantage a common, environmentally beneficial project. Thus, rather than utilize the resources, attention, and authority of state and federal actors, residents found themselves in a narrow, diminishing window of opportunity, and they acted as any rational actor would: they settled.

While contextual influences limited residents' ability to fashion a process around their broader interests (as they did in the Vulcan case), the dispute resolution process itself had equally important effects on the outcome. First and foremost was the representation of interests at the mediation. While the mediator was right to conclude that residents of other areas including Commerce City were "similarly situated" and thus would benefit from whatever agreements could be reached, he failed to anticipate how even similarly experienced problems can suggest a wide range of solutions, particularly when the problem is relatively complex. For example, Commerce residents, who had been represented for years on Conoco's Citizen Council, would have brought a level of experience with odor complaints and dealing with and interpreting Conoco's explanations of such odors beyond the scope of North Denver residents' more recent concerns. They would have offered additional organizational capacity and knowledge that could have increased the feasibility of the use of low-cost air monitoring equipment. Most importantly, they would have been able to communicate how Conoco's past attempts to adapt to changing regulatory requirements for sulfur emissions had *or had not* affected quality of life in the surrounding community. Some of this knowledge would have overlapped with what was known by North Denver residents, while some of it would have been unique and worthy of consideration.

Second was the manner in which interests were prioritized. Limited agendas (and groundrules), as well as representation of residents who began to take note of Conoco's sulfur emissions only recently, encouraged the mediation group to focus on sulfur dioxide and the technical feasibility of solutions to the flaring dilemma. It is safe to conclude that sulfur emissions was the primary topic of discussion, while permit violations was secondary (not because the citizen suit claimed violations but because Conoco's proposed solution demanded attention to permit language) and the need for monitoring and notification was tertiary or ignored. This ordering of interests open to discussion left the residents at a comparative disadvantage: They had to struggle with technical jargon and scenarios that did not call for their unique understanding of the effects of emissions, Conoco's contribution to odor problems vis-à-vis other facilities, or potential means of assisting the company with its monitoring efforts. Without broader experience with emissions reductions efforts at the refinery and other industries, residents were also unable to judge what certain emissions reduction goals would actually *mean* in terms of the reduction of nuisances or threats to human health. This lack of comfort in making certain value judgments also encouraged the group to yield to EPA's understanding of an adequate reduction level.

Third was the fact that plaintiffs had only partially overlapping interests. COPIRG had to answer to a state-wide constituency eager to win legislative victories and

set precedent through administrative changes and legal rulings. Residents desired these as well, but *only* if they served to enhance their sense of security, knowledge of emissions sources and effects, and ability to plan for and respond to emergencies or episodes. Even substantial reductions in sulfur emissions and associated permit changes do not alone ensure that these interests will be met. This is particularly true with a large facility that has over 80 emissions points and numerous toxic and hazardous pollutants to contend with. In thinking about future conflicts over plant emissions, the question of whether or not the mediation space can be expanded to include broader issues and concerns that more closely match a party's interests should be explored. When considering this question, it is important to ask whether joint filers of a citizen suit will impede a group's or coalition's ability to do so.

Finally, one must develop a better appreciation for how agencies initiate and industries adapt to regulatory actions and changes. Residents would have had a different bargaining position given (a) the lack of any RCRA action, (b) the initiation of only a CDPHE or EPA action, (c) a reversal in the order in which the actions were filed, or (d) a difference in Conoco's ability to anticipate regulatory change and build it into its goals and staff roles. As the RCRA actions moved toward resolution, residents unwittingly engaged in a mediation and considered a zone of agreement that had already been shaped beyond their ability to push back, through the assistance of the mediator, agenda, party representation, or other means. The importance of the mediator's style and approach is clear here: A mediator who operates by modeling the NEPA alternatives analysis approach will encourage biases that are similar to what NEPA engenders: technical and engineering forms of knowledge predominate, and social and experiential knowledge is subsumed. The mediator should also assist parties in building a shared understanding of anticipated regulatory developments. Indeed, the Department of Justice's recent settlement with Conoco greatly overshadows any progress made in sulfur dioxide reductions through the citizen suit. Residents had a chance to achieve meaningful, potentially cheaper improvements to monitoring and community relations within the context of larger sulfur emissions reductions encouraged by the federal government. Again, purposive thinking about the appropriate division of labor should be considered long before a party enters a mediation setting.

The Swansea-Elyria communities clearly demonstrated their ability to convert local experience, talent, and ideas into action and positive change. This was evidenced by the Swansea Community Park Proposal and COPEEN's use of lessons learned through the Right-to-Know project in working with small businesses. Representatives of these communities, from CCC and the neighborhood association in particular, have provided us with a unique opportunity to learn from their experience with mediation under different conditions. We will return to those lessons and further prescriptive advice in the closing chapter.

## Appendix A

Table 5. Important Events in Addressing Conoco SO<sub>2</sub> Emissions.

Date	EPA	CDPHE	Citizens/COPIRG	Conoco
1980's	Grants final authorization to operate a hazardous	Issues Compliance Order in May, 1985 pertaining to recordkeeping, storage of		

	waste program in lieu of federal program to CDPHE in 1984; Consent Order issued regarding hazardous waste emissions	waste in open or poorly maintained containers, inadequate aisle space in hazardous waste areas, and personnel training; Consent Order issued		
1990			COPIRG begins investigation of stationary sources of air emissions in CO as CAA is reauthorized	Stops producing leaded gas at Commerce City refinery; begins to offer low-sulfur diesel fuel at some Denver locations
1991	Notifies Conoco that significant hydrocarbon seepage into Sand Creek has been observed	Permit 10AD998 issued to Conoco for Claus Sulfur Recovery Unit and Tail Gas Incinerator ; Notifies Conoco that significant hydrocarbon seepage observed		Announces joint manufacturing venture with Colorado Refining Co. to share the cost of complying with environmental controls (.05% sulfur diesel fuel required by Pct. 1993)
1992	Inspection of Conoco for RCRA compliance	Inspection of Conoco for RCRA compliance; Issues Compliance Order in November (same issues as above plus container labeling and need to modify inspection program and contingency plans)	COPIRG helps pass the CO CAA; identifies power plants, refineries as major sources of air pollution in state/Denver area	Joint venture concept abandoned after Federal Trade Commission expresses concerns
1993		Asks Conoco for explanation of why No. 2 Claus Sulfur Plant is not subject to monitoring requirements, modification of permit and updated APEN		Requests modification of two air emission permits for sulfur processing facilities; upsets can cause diversion of sulfur to flare; request permit 91AD180-3 be modified to allow diversion of off-gas to #1 SRU; builds #2 SRU

Date	EPA	CDPHE	Citizens/COPIRG	Conoco
1994		Agrees to suspend modifications to 91AD180-3; Issues Inspection Report of Conoco in July		Writes CO attorney general regarding #1 SRU; explains changes made to allow processing of SWS offgas in #2 SRU; press reports toxic emissions increase 12% over 1993 to 143,611 pounds/yr (but has halved emissions since 1988); worker killed while vacuuming spent catalyst waste from reactor that removes sulfur from hydrocarbon streams
1995	Inspection of Conoco for RCRA compliance; violations noted mirror 1985 and 1992 Compliance Orders	Inspection of Conoco for RCRA compliance; grants permit to Conoco for construction of three stage claus sulfur recovery unit to convert sulfur in claus unit tail gas to sodium bisulfite (91AD180-3); emissions not to exceed 171 tons/yr SO <sub>2</sub>		Modifications to No. 2 Sulfur plant and tail gas unit reported to CDPHE; requests permit modification No. 90AD524 changing fired duty for one heater and updating emissions calculations using current emission factors
1996	Enters into Compliance Order on Consent to resolve Conoco's civil violations of 1989 Consent Order	Discuss odor complaints and upsets at refinery with CDPHE; discuss several areas of possible noncompliance with Conoco; requests data on incidents where acid gas and SWS offgas have been combusted in main plant flare since June 1993	Odor complaints made to CDPHE and other agencies	Discusses odor complaints and upsets with CDPHE; Enters into Compliance Order on Consent to resolve civil violations of 1989 Consent Order (includes SEP to collect household hazardous wastes in Commerce City
January 1997			Land and Water Fund of the Rockies attorney requests emission inventory retrievals from Air Pollution Control Division	

Date	EPA	CDPHE	Citizens/COPIRG	Conoco
February 1997		Process turnarounds and associated emissions differ from start-ups, shutdowns, and malfunctions; therefore, emissions need to be included in Conoco's construction permit; possibility would be to include process unit turnarounds as alternative operating scenario for #2 SRU		
March 1997	Complaint (78 counts of RCRA violations); proposed civil penalty of \$666,771 according to RCRA civil penalty policy			
April 1997				Motion for extension of time
May 1997				Answer and request for hearing
June 1997	Sends letter to Conoco counsel regarding pilot ADR project; motion for extension to consider pilot project and agency's national position on respondent's legal issues	Requests seven day advanced notice of major planned maintenance activities impacting SO <sub>2</sub> ; planned maintenance for #2 SRU need to be incorporated into construction permit for unit; process turnaround emissions need to be included in permit as alternative operating scenario		Motions for accelerated decision (counts 42-59 and 62-73); claim that failed to conduct certain inspections is unfounded, as Conoco has logs for inspections in question
July-Sept. 1997	Participates in ADR process with administrative law judge – litigation to recommence if settlement not reached; continuation recommended in Sept.			Participates in ADR process with administrative law judge
Oct. 1997	ALJ recommends termination of ADR process; parties remain far from agreement; order scheduling reply brief		Attorney proposes litigation to COPIRG	ALJ recommends termination of ADR process; parties remain far from agreement; order scheduling brief reply

Date	EPA	CDPHE	Citizens/COPIRG	Conoco
Nov. 1997	Requests stay of litigation to pursue settlement negotiations; hearing to proceed Jan 31 if no settlement		Notice of violations and intent to sue	Requests stay of litigation to pursue settlement negotiations with EPA
Dec. 1997		Involved in detailed discussions over permitting #2 SRU with Conoco		Conoco agrees to modify permit to include condition to address emissions which occur during planned process unit turnarounds
Jan. 1998	Reach settlement in principle; settlement to include sum plus SEP that meets SEP guidance; motion for time extension (granted)		Complaint filed under Section 304 of the CAA; proposed penalty of \$27,500 per day	Reach settlement in principle with EPA; motion for time extension (granted)
Feb. 1998			Notice of Settings; order for settlement conference; <b>meet with Mediator on Feb. 17</b>	Notice of Settings; order for settlement conference; <b>meet with Mediator on Feb. 17</b>
March 1998	Motion for extension; proposed SEP is administratively complex and involves CO, EPA, and COPIRG	Evaluates proposed SEP for possible necessary permit modifications; SEP will require administrative permitting review by CO air program, EPA, and COPIRG	Joint motion with Conoco to vacate order; joint motion to vacate scheduling orders (denied); scheduling conference for April 15; <b>meet with Mediator on March 10 and 31</b>	Joint motion with COPIRG to vacate order; joint motion to vacate scheduling orders (denied); scheduling conference for April 15; <b>meet with Mediator on March 10 and 31</b>
April 1998			Scheduling order and rule 26(f) discover plan; <b>meet with mediator on April 20</b>	Scheduling order and rule 26(f) discovery plan; <b>meet with mediator on April 20</b>
May 1998			Agreement regarding notice of dismissal; will sign settlement agreement and release	Agreement regarding notice of dismissal; will sign settlement agreement and release
June 1998	Motion for extension to file Consent Agreement (granted)			
July 1998	Several negotiation sessions since June 1998 with EPA (one remaining for July 21)	State of Colorado Inspection Report for Conoco (July 26)		Several negotiation sessions since June 1998 with EPA (one remaining for July 21)

Date	EPA	CDPHE	Citizens/COPIRG	Conoco
August 1998	Consent Agreement and Order	Compliance Order on Consent	Order of dismissal (sign agreement with Conoco on April 29, 1999)	Order of dismissal (signs agreement with COPIRG et al. on April 29, 1999); Consent Agreement and Order with EPA